Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

OMEGA ENVIRONMENTAL, INC.; ATS OMEGA; KELLEY OMEGA; JOHN J. REYNOLDS; PATRICK J. REYNOLDS; MICHAEL J. REYNOLDS; FEDORICO HALLER; FRANCISCO CALLEJA; FERNANDO CALLEJA; WILLIAM H. KELLEY,

Petitioners,

v.

GILBARCO, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reversing the finding of a properly instructed jury that an exclusive dealing policy adopted throughout a highly concentrated industry had an anticompetitive effect under Clayton Act § 3, did the Ninth Circuit majority (Pregerson, J., dissenting) err in its unprecedented creation of areas of *per se* antitrust legality?

2. Did the Ninth Circuit err in holding as a matter of law, and contrary to Supreme Court precedent, that a distributor's challenge to exclusive dealing is subject to a higher standard than a challenge by an end-user, and that, regardless of its effects, such exclusive dealing is legal unless a potentially competing manufacturer somehow could not sell directly to all end-users?

3. Did the Ninth Circuit err in holding as a matter of law that industrywide exclusive dealing could not be anticompetitive because prices had been declining and output increasing, despite evidence from respondent's own witnesses and documents and from petitioners' economist that (a) exclusive dealing was intended to and had the effect of maintaining higher prices than would have occurred in a competitive market, (b) the manufacturer enforced exclusive dealing to avoid further price cuts, and (c) the increase in output reflected new demand driven by government environmental regulations, not lower prices?

4. Did the Ninth Circuit err in creating a category of *per se* legality for exclusive dealing arrangements based on nominal contract length?

PARTIES AND RULE 29.6 LISTING

The parties to the proceedings below were:

Appellant/Cross-Appellee (respondent herein): Gilbarco, Inc.

Appellees/Cross-Appellants (petitioners herein): Omega Environmental, Inc.; ATS Omega; Kelley Omega; John J. Reynolds; Patrick J. Reynolds; Michael J. Reynolds; Fedorico Haller; Francisco Calleja; Fernando Calleja; William H. Kelley

Cross-Appellee: Rochester Petroleum Equipment Company

In accordance with Rule 29.6, there is no other parent company or subsidiary company to be listed with respect to petitioners. Respondent Gilbarco is the sole subsidiary of a holding company that is wholly owned by the General Electric Company P.l.c., which is not affiliated with the General Electric Co., a United States Company.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed October 29, 1997. It is reported at 127 F.2d 1157 and is reprinted at Appendix ("App.") A1-A57. The unreported opinion of the United States District Court for the Western District of Washington denying respondent's renewed motion for judgment as a matter of law or, in the alternative, for a

new trial was filed April 1, 1996, and is reprinted at Appendix B1-B2.

JURISDICTION

This Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's opinion was filed October 29, 1997. A timely petition for rehearing with suggestion for rehearing *en banc* was denied, Judge Pregerson dissenting, February 10, 1998, and is reprinted at Appendix C1-C3.

STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1; Clayton Act § 3, 15 U.S.C. § 14; and United States Constitution, Amendment VII appear verbatim at Appendix D1-D2.

STATEMENT OF THE CASE

It is highly unusual for an appellate court to reverse an antitrust jury verdict without disturbing the instructions or reviewing all of the evidence going to the key issue of the anticompetitive purpose and effect of defendant's conduct. Here, a jury found that a manufacturer's imposition and enforcement of an exclusive dealing policy on its distributors substantially impaired competition in violation of Clayton Act § 3. To understand the unrebuttable presumptions created by the Ninth Circuit in reversing the jury's verdict, it is necessary to set forth the factual context in some detail.

(a) *Gilbarco and the Retail Dispenser Market It Dominates*. Respondent Gilbarco, Inc. ("Gilbarco") manufactures and sells gas pumps (known technically as retail fuel dispensers). The market is extremely concentrated. Four firms--Gilbarco, Dresser-Wayne, Tokheim, and Schlumberger--control 97% of sales in the United States, the agreed geographic market. SER0846-47, SER0486-91.[1] The market has a Herfindahl-Hirschman Index of 3,679, which makes it "highly concentrated," and thus a significant risk to competition. DOJ-FTC *Merger Guidelines* § 1.51(c), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6 (1992). Concentration has been steadily increasing. There has been no successful entry for decades.[2]

Gilbarco is the dominant dispenser manufacturer. In 1995, Gilbarco had 55% of the overall market in the United States for sale of dispensers, a 50% increase in market share since 1991. SER0846-47, SER0486-91, CSER0183-95. Of the more than $280 million in sales to distributors who resell to independent gas station owners, Gilbarco held a 61% share, with the next largest manufacturer (Tokheim) holding a 17% share. *Id.* For direct sales to major oil companies for their company-owned gas stations, Gilbarco held a 45% share, with the next largest manufacturer (Dresser-Wayne) holding a 36% share. *Id.* Sales grew during the mid-1990s because

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[1] "SER" is the Supplemental Excerpts of Record in the Ninth Circuit; "CSER" is the Confidential Supplemental Excerpts of Record.

[2] An existing competitor (Southwest Pump) was purchased by Schlumberger, a foreign manufacturer, but that did not add a competitor or decrease concentration. *See infra* page 29.

of environmental regulations requiring gas stations to replace the underground tanks from which the fuel is dispensed. SER0375-77, SER0589, SER0720, SER0913.

The market has significant barriers to entry. App. A39 n.6. (Pregerson, J., dissenting). A key barrier is the need to establish a national distribution network for sales of dispensers to the numerous independent station owners. Each of the manufacturers has a network of 100-150 distributors to serve these customers. Distributors do not carry only dispensers; instead, they carry over one hundred products necessary to build and maintain gas stations and other fueling facilities.

In the past, "several foreign manufacturers of retail petroleum dispensers attempted and failed to enter the United States because they could not obtain or create distributors." App. A27 (Pregerson, J., dissenting). SER0467-71. Koppens, a Dutch manufacturer, tried to break into the market during the 1980's, but was unable to acquire distributors to support its equipment in the field. It left the market in 1988, having peaked at a 1% share. SER0733-37, CSER0197. Tatsuno, a Japanese company that is the largest dispenser manufacturer in the world, also failed in its efforts to gain entry into the United States during the last decade. SER0102-03, SER0248-50, SER0371-72, SER0721, SER0883. Gilbarco did not dispute how unusual it is for a large Japanese competitor to fail in its efforts to enter the United States market.

Because demand for retail dispensers is inelastic, price cuts do not stimulate greater demand. CSER0074. This, plus the highly concentrated nature of the market at the manufacturer level, facilitates classic oligopolistic

pricing strategies. Gilbarco witnesses testified that Gilbarco is reluctant to increase prices for fear that its rivals will not follow suit, but fears lowering prices because it assumes that its rivals will also lower their prices, resulting in the same number of dispensers being sold by all four of the manufacturers at lower prices. CSER0069-70, CSER0106-07, CSER0120-21. For this reason, Gilbarco, the firm with the greatest impact on market prices, engages in strategies designed to minimize discounting. Gilbarco has been able to limit discounts to even its most favored major oil company customers to about 2%. CSER0083-93, CSER0176-77. Gilbarco avoids more significant discounts that could disrupt "normal" industry price levels and lead to a price collapse. CSER0069-70, CSER0119-21. Gilbarco witnesses testified that in 1994, the year petitioners ATS and Kelley were terminated, Gilbarco feared that an outbreak of aggressive pricing could drive down prices 15-20%. CSER 0105-07, CSER0171-73, SER0727-29.

Gilbarco and the other three manufacturers impose exclusive dealing contracts on their distributors. Thus, the vast majority of the 500 petroleum equipment distributors in the United States are tied exclusively to one of the four manufacturers. SER0099, SER0171-72; SER0369-70, SER0462, SER0468. No other product handled by these distributors is subject to exclusive dealing. SER0099, SER0149, SER0153, SER0302-21.

Gilbarco recognized that exclusive dealing limits the price pressures faced by it and its competitors and forestalls deep discounting. SER0273, SER0346, SER0357, SER0419. Exclusive dealing does this by increasing information costs to end-users, who are

required to go to different distributors to learn about the prices and features of each brand of dispenser. SER0483-85. These information costs render end-user demand less elastic.[3] SER0482-484. Exclusive dealing also limits the ability of distributors to force manufacturers to compete for sales to them. SER0484-85. For these reasons and because of its exclusionary effect on entry by competitors, exclusive dealing has kept the price of dispensers "artificially high." App. A55 (Pregerson, J., dissenting). SER0511-12.

(b) *Omega Enters Dispenser Distribution and Threatens Lower Pricing.* Petitioner Omega is a publicly held environmental services company founded in 1991. Its business plan was to purchase petroleum equipment distributors to develop a national service and distribution network to serve firms that operate fueling facilities, including gas stations, car rental fleet garages, and airport fueling facilities. Omega planned to provide "one-stop shopping" to such customers through which they would be able to purchase at lower prices a broad range of products and services needed to build and maintain fueling facilities. SER0196-97.

A significant element of this plan was consolidated purchasing from manufacturers, with Omega's negotiating with a manufacturer on behalf of all the Omega distributors that carried that manufacturer's line of products. SER0181, SER0185-87. Another element

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[3] *See also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 475-76 (1992) (noting that information costs can "lock in" consumers).

was transfer of product from one Omega-owned distributor to another at a slight markup, for resale to a customer. SER0919-20, SER0177.

Omega targeted for acquisition sixty distribution and service firms that it considered the "best of the best." SER0181-87, SER0386-87. By October 1993, Omega had acquired six distributors and was negotiating with many more. Of the six, two were Gilbarco distributors (petitioners ATS Omega and Kelley Omega), and all four of the major dispenser manufacturers were represented. Omega's growth caused a major industry controversy. In December, Omega met with Gilbarco's Senior Marketing Analyst and Eastern Regional Manager. They discussed Omega's intentions to grow through acquisition, to obtain 10-20% better pricing through consolidated purchasing, and to consider including dispensers in an Omega products catalog. SER0413-18, SER0420, SER0123-26, CSER0241.

(c) *Gilbarco Responds to Omega.* The Senior Marketing Analyst returned to Gilbarco and warned that Omega would "intensify interbrand price competition" by providing an easy basis for comparison and by selling dispensers on a price basis, rather than on the basis of non-price features. SER0419. Gilbarco's National Sales Manager was concerned that Omega might become large enough that Gilbarco would have to accede to price demands through consolidated purchasing. SER0348-49. Gilbarco also feared that increased competition would result from Omega's plans for its Gilbarco distributors to sell Gilbarco equipment to other Omega-owned distributors. SER0394-95. Because these transfers between distributors would take place at prices lower

than the typical 15-20% markup that distributors charge each other, SER0163-67, they would substantially intensify price competition. SER0345-46.

Gilbarco quickly convened an emergency meeting of its Distributor Advisor Council ("DAC"), which consists of distributors selected to represent distributors' concerns. SER0288. Gilbarco warned the distributors of Omega's plans and their likely impact on dispenser distribution. SER0212-15. The DAC agreed that Omega was a competitive threat. SER0212-15. The distributors feared that they would be forced to compete with Omega-owned distributors that would have superior buying power, more sophisticated approaches and resources, and a broader product line. SER0210-11. One distributor feared that Omega would become a "Walmart" that would "be able to offer you anything the customer was looking for" at a lower price. SER0299-03, SER0309, SER0850.

As to Gilbarco's pricing, the distributors agreed that Omega-owned distributors would have access to more than one brand of dispenser, would play one manufacturer off against another, and would favor the "lowest price pumps." SER0852, SER0267-74. The DAC Chair foresaw that he would be forced to compete with Omega-owned distributors in a position to force "a contest between the pump companies" as to "[w]ho is willing to give the [Omega distributor] the best [price] deal." SER0271-73, SER0508-10. Gilbarco agreed with this assessment of Omega's impact on manufacturer pricing. SER0273-74. Gilbarco's National Sales Manager also reported that Tokheim feared Omega's impact. SER0214, SER0286-87, SER0365-67.

One distributor requested in writing that Gilbarco terminate any distributor purchased by Omega, for fear that Omega would obtain better pricing. SER0262-67, SER0813-14. Gilbarco's official minutes of the meeting reveal that the "DAC recommended that Gilbarco cancel [any] distributor . . . who signs with Omega." SER0918.

Following the DAC meeting, Gilbarco management discussed the planned response to Omega by Dresser-Wayne and Tokheim, Gilbarco's key competitors. Notes of Gilbarco's internal discussions report that:

> Eliot [Distributor Sales Manager (SER0895-96)] at Wayne says that any Wayne distributor bought by Omega is history. Tok[heim]? says the same thing. Both apparently will take strong position against Omega.

SER0801-02; *see* SER0365-67. Following these discussions, Gilbarco terminated distributors that Omega had already purchased and announced that it would continue to do so because an Omega distributor of Gilbarco products would violate the exclusive dealing policy by having access to other brands through other Omega distributors. CSER0242.

(d) *The Trial Court's Decision.* Following instructions based on Gilbarco's Rule of Reason proposals, the jury found for petitioners on their claims under § 3 of the Clayton Act, which prohibits exclusive dealing whose effect "may be to substantially lessen competition." As Judge Pregerson noted, Omega presented "more than substantial evidence" to prove,

inter alia, that industrywide exclusive dealing in this concentrated market "creates entry barriers for new manufacturers of retail petroleum dispensers" and "inflates the prices at which existing manufacturers sell retail petroleum dispensers to their distributors." App. A25-26. The trial court denied Gilbarco's motions for judgment as a matter of law or, in the alternative, for a new trial. App. B1-2.

(e) *The Court of Appeals' Decision.* Over Judge Pregerson's dissent, the Ninth Circuit reversed the jury verdict. The Ninth Circuit did not question the Rule of Reason instructions to the jury. Instead, the court created a number of legal presumptions that, in its view, rendered the jury's factfinding irrelevant. Because the jury was not allowed to determine if the evidence as a whole rebutted these presumptions, the result is *per se* legality.

REASONS FOR GRANTING THE WRIT

The jury's verdict was based on modified Rule of Reason instructions largely as proposed by Gilbarco and not challenged on appeal. The record is replete with facts supporting the jury's assessment of procompetitive and anticompetitive effects, and its conclusion that, on balance, the exclusive dealing here was anticompetitive. The Ninth Circuit did not rebalance all the evidence. Instead, over a lengthy and vigorous dissent by Judge Pregerson, the court identified certain facts that it viewed as undisputed. These are the facts the Ninth Circuit concluded were sufficient as a matter of law to preclude a finding that the exclusive dealing was anticompetitive:

- That because the restraint operated only on distributors, potential manufacturer entrants theoretically could sell directly to end users, and affected end users theoretically could buy directly from manufacturers;

- That prices had been declining somewhat (even though there was evidence that prices were still above competitive levels and that the very purpose of enforcing exclusive dealing was to keep them from falling farther) and output had been increasing (even though that was due to increased demand resulting from government regulation requiring the replacement of underground fuel storage tanks); and

- That the restraint was imposed on distributors that had a contractual right to terminate the relationship in a year or less (even though because of installed base considerations distributors in fact did so infrequently).

These are all facts that Gilbarco appropriately presented for the jury's consideration and that the jury was instructed to consider. Petitioners do not agree that these facts were undisputed. But, for purposes of this petition and the future vitality of antitrust enforcement, what is important is that the Ninth Circuit turned these facts into safe harbors of *per se legality* unreachable by the Rule of Reason despite any other facts regarding the anticompetitiveness of the restraint in this particular market.

If the Ninth Circuit had simply reassessed the evidence, it would have violated the Seventh Amendment, but the damage would be limited to petitioners. What merits this Court's review is that the decision below conflicts with the basic framework of

exclusive dealing and Rule of Reason analysis applied by this Court and by other courts of appeals.

There have been proposals by commentators over the years that certain restraints should be *per se* legal. *E.g.*, R. Posner, *The Next Step in the Antitrust Treatment of Restrictive Distribution: Per Se Legality*, 48 Chi. L. Rev. 1 (1981). Until the Ninth Circuit's opinion in this case, however, no court had adopted a category of *per se* legality. Indeed, this Court has implicitly and explicitly rejected such proposals, most recently in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 479 n.29 (1992) (rejecting dissent's proposal to grant "*per se* immunity" to manufacturers competing in the service market; doing so "would exempt a vast and growing sector of the economy from antitrust laws," the Court's authority to make such a policy decision is in doubt, and there is no support for it in the Court's jurisprudence).[4]

Such a judicially created exception to the scope of the Rule of Reason is particularly unwarranted for a type of restraint, exclusive dealing, as to which Congress, in enacting Clayton Act § 3, has expressed specific concern going beyond the more general strictures of the Sherman Act. Judicial exceptions to the plain language of a statute are even more questionable when based on unstated economic theories that neither were subject to scrutiny at

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[4] *See also Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1065, *amended*, 1994 U.S. Dist. LEXIS 15997 (N.D. Ga. 1994) (rejecting argument that 32%-38% market foreclosure from exclusive dealing is "*per se* legal").

the trial court level nor are undisputed and subject to judicial notice. Neither Gilbarco's economist nor its Ninth Circuit briefing provided any expert support for the Ninth Circuit's unrebuttable presumptions, and the Ninth Circuit cited none.

If "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972), the creation of areas of *per se* legality should be approached with equal hesitation, and should be done only by this Court, if not Congress. *See State Oil v. Kahn Co.*, No. 96-871, 118 S. Ct. 275 (1997). The harm caused by erroneously creating *per se* rules is well evidenced by the history of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). *See State Oil, supra* (overruling *Albrecht*'s *per se* approach to resale price maintenance in favor of Rule of Reason). *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

If this Court does not correct the Ninth Circuit's error, history will repeat itself, and the Ninth Circuit's decision will cripple enforcement of Clayton Act § 3 and the Rule of Reason as applied to all vertical restraints.

I. ANY CATEGORY OF *PER SE* LEGALITY IS A FUNDAMENTAL DEPARTURE FROM THIS COURT'S PRECEDENT

The Ninth Circuit violated this Court's recent admonition:

> Legal presumptions that rest on formalistic distinctions rather than

> actual market realities are generally disfavored in antitrust law. This court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.

Kodak, 504 U.S. at 466-467 (citations omitted). The Court explained in *Kodak* why courts should not create *per se* immunities. *Id.* at 479 n.29. As the Court stated in *Sylvania*, "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... formalistic line drawing." 433 U.S. at 58-59.

The plain language of Clayton Act § 3 prohibits exclusive dealing where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. The Act embodies a clear legislative determination that exclusive dealing is a potentially dangerous restraint on competition, one that must be assessed both for its present harm and for the harm it may create.[5] The Clayton Act "was intended to supplement the purpose and effect" of the Sherman Act, and "sought to reach [anticompetitive arrangements] in their incipiency." *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355-56 (1922).

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[5] *See also* 1 Earl W. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, at 1744 (1978) (reprinting July 22, 1914 Report of the Senate Committee on the Judiciary, S. Rep. No. 698, 63d Cong., 2d Sess.).

Exclusive dealing may harm competition in several ways. At a minimum, especially where there are economies of scale and scope in distribution, exclusive dealing increases the cost of market entry.[6] Moreover, because exclusive dealing lowers price elasticity, it can facilitate actual collusion among competitors, or increase the likelihood of interdependent behavior or oligopolistic pricing that yields results similar to collusion.[7] It may also enhance the market power of a dominant seller or group of sellers. *In re Beltone Electronics Corp.*, 100 F.T.C. 68, 263-64 (1982).

The foundation of exclusive dealing analysis is found in *Standard Oil Co. v. United States* ("*Standard Stations*"), 337 U.S. 293 (1949), and *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). These opinions require an individualized, fact-specific inquiry into the actual and probable impact of exclusive dealing on competition. These decisions are fundamentally inconsistent with the Ninth Circuit's creation of categories of exclusive dealing that are *per se* legal.

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[6] *See* 1 Katz, *Vertical Contractual Relationships*, Handbook of Industrial Organization 655, 700-14 (Schmalensee & Willig eds., 1989); Besanko & Perry, *Exclusive Dealing in a Spatial Model of Retail Competition*, 12 Int'l J. Indus. Org. 297-99 (1994); Comanor & Frech, *The Competitive Effects of Vertical Agreements*, 75 Am. Econ. Rev. 539 (1985).

[7] Herbert Hovenkamp, *Federal Antitrust Policy* § 10.8b (1995) (where manufacturer market shows signs of being conducive to collusion, widespread exclusive dealing imposed on distributors supports inference that exclusive dealing is being used as cartel facilitator). *See also* National Association of Attorneys General (NAAG), *Vertical Restraint Guidelines* §§ 3, 4 (1995).

In *Tampa*, the Court acknowledged that there is no bright line to differentiate circumstances constituting a "substantial" effect on competition from those in which lessened competition is a "remote" possibility. *Id.* at 326. For this reason, the Court set out a three-part analytic framework:

> (1) "the line of commerce, i.e., the type of goods, wares, or merchandise, etc., involved must be determined";
>
> (2) "the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure must be in relation to the market affected"; and
>
> (3) "last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited[.]"

Id. at 327-28 (citing *Standard Stations*). In assessing the substantiality test, the Court instructed that

> it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant

> market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Id. at 329.

Although a plaintiff's burden of proof is lower under the Clayton Act than under the Sherman Act,[8] the relevant factors are found in the Rule of Reason, and the jury here was instructed in those terms. Moreover, although Congress in enacting the specific prohibitions of Clayton Act § 3 has expressed skepticism toward exclusive dealing, the ultimate question is straightforward: whether on balance the particular exclusive dealing suppresses competition. App. A36 (Pregerson, J., dissenting). This is a factual issue. The economic theories used by the Ninth Circuit to trump the jury's factfinding were unstated but are hardly incontestable.[9] If economic theories are to provide the

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[8] *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1447 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 n.9 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982).

[9] Although the Ninth Circuit posited that "there are well-recognized economic benefits to exclusive dealing, including the enhancement of interbrand competition," App. A9, it cited no such evidence in the trial record of this case. It simply presumed erroneously that such benefits always exist, contrary to Congress's implicit finding in enacting the Clayton Act. The Ninth Circuit did not even mention the detailed analysis of Omega's economist that there were no procompetitive implications of the restraints here, or

basis for legal rules that override factfinding, this is a policy issue that belongs to Congress, not the courts.[10] Congress has not adopted such theories, however. Rather, Congress has left it to factfinders in the trial process to decide on a case-by-case basis whether competition is harmed. This is the approach endorsed by this Court in *Standard Stations* and *Tampa*.

The Ninth Circuit rejected this fact-based approach, and instead substituted legal presumptions by holding that (i) exclusive dealing claims brought by distributors rather than end-users must meet a higher standard of proof because the possibility of alternate channels of distribution by manufacturers seeking to enter a market renders exclusive dealing competitively benign; (ii) limited discounts by a manufacturer immunize from challenge vertical restraints that have the purpose and effect of limiting the extent and depth of those discounts; and (iii) distribution contracts with a nominal length of one year or less are lawful. Those presumptions are

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the economist's careful explanation of the anticompetitive effects. App. A51 (Pregerson, J., dissenting). *See also* NAAG Guidelines § 3.2 (procompetitive effects of vertical restraints not presumed to exist; will be considered only if demonstrated that significant benefits exist, that they outweigh all anticompetitive effects, and that the benefits will be passed on to consumers). Gilbarco's exclusive dealing policy "is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact." *Kodak*, 504 U.S. at 479.

[10] *Kodak*, 504 U.S. at 479; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 423 (1995).

apparently unrebuttable.[11] Otherwise the Ninth Circuit would have reversed the jury instructions and remanded the case.

Central to the Ninth Circuit's ruling is the truism that a manufacturer can always distribute its own products and thus avoid independent distribution. From this, the Ninth Circuit concluded that exclusive dealing imposed on distributors could not substantially restrain competition. The Ninth Circuit's decision largely immunizes *any* type of restraint imposed by manufacturers on distributors (whether wholesalers or retailers). Exclusive dealing and most of the restraints subject to the Rule of Reason operate exclusively or predominantly on distributors and rarely act directly on customers. Resale price maintenance, geographical and customer restrictions, full-line forcing and exclusive franchises all operate only on distributors. If potential direct or internal distribution by a manufacturer immunizes from challenge its exclusive dealing policy, no matter the particular anticompetitive effect, it follows that all policies directed at its distributors are immunized, including resale price maintenance, which has traditionally been deemed a *per se* violation.

Similarly dangerous is the Ninth Circuit's assumption that the law regarding vertical restraints has little or no role to play in markets in which prices are declining (however marginally) and demand is

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[11] *See* Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials In A Less Determinate Theoretical World*, 63 Antitrust L.J. 669, 677 (1995).

increasing (for reasons unrelated to price). The Ninth Circuit's decision frees firms to enforce vertical restraints at exactly that time when they are most likely to want to do so--when necessary to slow a price war or to forestall entry.

This Court should decide if there is any role at all in antitrust law for categories of *per se* legality. The Court has never suggested in the past that there is; Congress has created no *per se* exceptions to the broad scope of Clayton Act § 3; and the decision below conflicts with the accepted understanding of this Court and other courts of appeals.

II. THE NINTH CIRCUIT FLOUTED THIS COURT'S PRECEDENT AND THE LANGUAGE OF CLAYTON ACT § 3 BY CREATING A SAFE HARBOR FOR IMPOSING EXCLUSIVE DEALING ON DISTRIBUTORS

This Court has provided no precedent for the Ninth Circuit's holdings that exclusive dealing imposed on distributors is subject to a burden of proof different from that applied to claims involving end-users,[12] and that, as long as a manufacturer seeking to enter a market may perform the distribution functions internally, exclusive dealing imposed on distributors by the incumbent manufacturers *cannot* substantially foreclose the market. *See* App. A13 ("no anticompetitive impact where

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[12] App. A11 (citing *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987)).

plaintiffs not foreclosed from *every* alternative") (emphasis supplied). *Standard Stations* directly addresses exclusive dealing contracts imposed on distributors and, despite measurably less restriction on the market than demonstrated in the instant case,[13] found liability under the Clayton Act.

Nor is a rule imposing a higher burden on distributors consistent with the language and history of Clayton Act § 3. Exclusive "dealing" affects "dealers," and Congress could have created a different standard for resellers if it thought one appropriate. Instead, the legislative history addresses exclusive dealing imposed on distributors and is virtually silent as to end-users. 1 E. Kintner, *Legislative History of the Federal Antitrust Laws* at 1092-94, 1744. If anything, Congress made it clear that it was concerned as much with preserving the "freedom" of these "independent" businesspeople as with the anticompetitive effects on others. While the Ninth Circuit may disagree with that policy approach, it is not free to ignore it.

In fact, the Ninth Circuit's presumption is not supportable as a matter of economic theory or sound public policy. In many markets, distributors play a critical role as the consumers' agent in dealing with competing manufacturers. Distributors are often better positioned than consumers to compare and evaluate

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[13] Standard Oil controlled 32% of the total market. Within that market, 6.7% of sales were through independent service stations under exclusive contract to Standard. Sixteen percent of the available independent service stations were under exclusive contract to Standard. *Standard Stations*, 337 U.S. at 295.

different products and to provide price and product information that permits the consumer to make an informed choice. App. A47-48.[14]

Because a manufacturer can always forego distribution entirely and, at some cost, sell directly to all end-users, the Ninth Circuit has effectively repealed Clayton Act § 3 as to distributors.[15] The record in this case bears out the fallacy of the Ninth Circuit's theory. Gilbarco's president conceded at trial that it would cost Gilbarco one million dollars to construct a single multi-product distribution facility. SER0725-26. He further testified that, if he were a foreign manufacturer seeking to enter the market, he would not even attempt to build a national network of such facilities. Instead, he would purchase existing distribution by buying the smallest domestic dispenser manufacturer and inheriting its distributors. Omega Reply ER, Tab 18.

The Ninth Circuit's presumption that the theoretical possibility of direct distribution negates the anticompetitive effects of exclusive dealing has broad and troubling implications for future antitrust

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[14] Absent the presence of informed distributors, consumers are faced with bearing all information costs. This commercial reality may both impede competition and cause actual market behavior to depart from economic theory. *See, e.g.*, *Kodak*, 504 U.S. at 473-77.

[15] The possibility of entry through direct sales is a relevant inquiry, but the key question is the extent of the costs of entry, and whether they are so high as to deter entry. This is a fact-specific inquiry for the jury, not a subject for a legal presumption.

enforcement.[16] Stated simply, under the decision in this case, because a manufacturer can always forego independent distribution, it enjoys antitrust immunity for its actual distribution policies regardless of anticompetitive effect. This *per se* rule renders lawful virtually all vertical restraints. Such a policy decision is for Congress, not the courts.

III. MISCONSTRUING *BROOKE GROUP*, THE NINTH CIRCUIT ERRED BY HOLDING THAT EVIDENCE OF DECLINING PRICES AND INCREASING OUTPUT IMMUNIZES VERTICAL RESTRAINTS WITH THE PURPOSE AND EFFECT OF LIMITING THE DECLINE OF PRICES

Without reference to the record or citation to any case construing Clayton Act § 3, the Ninth Circuit held that no injury to competition can occur where there is "increasing output, decreasing prices, and significantly fluctuating market shares among the major manufacturers." App. A17. Here, the Ninth Circuit applied an overly simplistic approach to economics and cited *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993). This is a

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[16] This Court has never approved such a presumption. *See, e.g., Standard Stations*, 337 U.S. at 295-96 (exclusive dealing with distributors violates Clayton Act § 3 despite extant alternate channels of distribution by Standard Oil, including direct sales to industrial users and direct sales through company-owned service stations, which together accounted for 16.3% of the total market).

dangerous misreading of *Brooke Group*.[17] It also conflicts with *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941) and other decisions of this Court.

Contrary to the Ninth Circuit's view, short-term price cutting is not conclusive proof of the absence of anticompetitive restraints. The Court long ago recognized that evidence of a price reduction does not preclude anticompetitive market behavior. A "monopoly contrary [the policies of the Sherman and Clayton Acts] can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold." *Fashion Originators Guild*, 312 U.S. at 467.[18] *Brooke Group* does not hold otherwise. In *Kodak*, the Court recognized "the false dichotomy that there are only two prices that can be charged--a

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[17] *Brooke Group* is inapposite to an analysis of long-standing exclusive dealing policies. *Brooke Group* addressed a distinct, short-term episode of alleged predatory pricing. It was reasonable to review price and output data during subsequent years to determine whether, at the time of the alleged predatory pricing, there existed a reasonable likelihood that prices could later be increased during the "recoupment" stage. 509 U.S. at 233-35. Here, by contrast, exclusive dealing has infected the dispenser market for decades, independent of fluctuations in output, price, or share in response to immediate market events. A price recoupment analysis under *Brooke Group* does not shed light on the impact of long-standing distribution policies of an entire industry.

[18] The Court may have had in mind that the original Standard Oil monopoly had repeatedly lowered prices and increased output to avoid inviting scrutiny and new entry. R. Chernow, *How to Stay a Titan*, N.Y. Times, Apr. 19, 1998, at 17.

competitive price or a ruinous one." 504 U.S. at 470-71. These decisions acknowledge that concentration can increase prices above competitive levels and that oligopolists sometimes take steps to keep prices from falling too far.

The immunity granted by the Ninth Circuit would shield from scrutiny anticompetitive conduct that restricts entry by firms outside the market or dampens the intensity of price competition. In this regard it is in conflict with the Seventh Circuit's recent decision in *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997) (practice may violate antitrust laws if it restrains but does not eliminate competition), *cert. denied* No. 97-775, 118 S. Ct. 1178 (1998). At a time when prices for electronics (like the computer chips and software incorporated in gasoline dispensers) are falling, the question often will be whether prices are falling and output is increasing as far and as fast as they would in competitive markets.[19] *See FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082 n.14 (D.D.C. 1997); *Amarel v. Connell*, 102 F.3d 1494, 1500, 1522 (9th Cir. 1997) (Section 1 claim found even though prices were falling and output increasing). The Ninth

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[19] The Ninth Circuit ignored evidence that the major manufacturers priced interdependently, and that the price decreases at issue were minimal and largely reflected cost savings on electronic components. Overall, prices were essentially stagnant. *See* App. A51 (Pregerson, J., dissenting).

Circuit's rule will play havoc with efforts to enforce the antitrust laws in such markets.[20]

Only by granting *per se* legal immunity was the Ninth Circuit able to ignore the substantial evidence considered by the jury that the exclusive dealing policy kept prices from declining as far as they would have in a competitive market. The Ninth Circuit ignored direct evidence from Gilbarco witnesses that during 1994 (the year petitioners were terminated), Gilbarco feared that an outbreak of intense price competition could result in a decline of industry price levels by 15-20%, CSER0105-07, CSER0171-73, SER 0727-29; and feared that distributors not bound by exclusive dealing would facilitate lower prices. SER0419 (Gilbarco market analyst), SER0345-49 (Gilbarco sales manager), SER0272-74 (chair of the Gilbarco distributor advisory counsel).[21] Moreover, notwithstanding modest prices

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[20] *See* Joseph F. Brodley, *Post-Chicago Economics and Workable Legal Policy*, 63 Antitrust L.J. 683, 687-88 (1995) (exclusionary conduct that raises rivals' costs in intermediate market may injure consumers by sustaining existing supracompetitive prices free from challenge by more efficient rivals, even absent evidence of an immediate price increase).

[21] Moreover, Gilbarco's evidence of increased output between 1991 and 1994 was entirely consistent with the oligopolistic nature of this market. Gilbarco's output expanded in the face of a significant increase in demand, while prices (adjusted for cost savings) remained essentially unchanged. CSER0146-47, CSER0175, CSER0204. This outcome is inconsistent with models of competitive markets, but consistent with "tacit collusion" in which firms fear that competitors might not follow suit in raising prices, undercutting the long-term relationship. *See* F. Scherer,

cuts during 1991-1994, Gilbarco's profit margins remained essentially constant and above competitive levels. CSER0160-65, SER0765-67.

IV. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE NOMINAL LENGTH OF THE DISTRIBUTOR CONTRACTS NEGATED THE ANTICOMPETITIVE EFFECT OF EXCLUSIVE DEALING

The *nominal* length of the distributor contracts cannot be considered in the abstract. As this Court has noted, the existence of an installed customer base constitutes a "commercial reality" that can prevent actors in the market from behaving purely in accordance with economic theory. *Eastman Kodak*, 504 U.S. at 460, 474-77.[22]

Ninety percent of Gilbarco's contracts extend beyond their nominal length. Most are older than five years. Many are decades old. SER0106-07; SER0259-

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Industrial Market Structure and Economic Performance 164-68 (2d ed. 1980); V. Bhaskar et al., *Testing a Model of the Kinked Demand Curve*, 34 J. Ind. Econ. 241, 244-45 (Mar. 1991).

[22] Exclusive dealing analysis cannot rely on abstractions of economic theory. A factual assessment of real market imperfections, such as that undertaken by petitioners' economist into switching and information costs, is necessary. *See Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 45 (1984) (exclusive dealing analysis must consider market imperfections, such as "the ease with which buyers and sellers can redirect their purchases or sales to others"); NAAG Guidelines § 3.1 (economic models that fail to account for market imperfections will often lead to inaccurate or incomplete enforcement decisions).

61; SER0292; SER0714-15. Only by creating a legal presumption could the Ninth Circuit ignore that here, in reality, the contractual right to terminate on sixty days notice after the first year "means little." App. A54 (Pregerson, J., dissenting).

Distributors earn little on the initial sale of dispensers, but much more on continuing sales and service to their installed base of customers. To simplify maintenance, training, and operation, station operators typically purchase only one brand of dispenser. Thus, switching lines from one dispenser manufacturer to another requires the distributor to abandon its installed base. SER 0079-86, 0106-08, 0151-52. Distributor switching from one domestic manufacturer to another is rare. It is unheard of for a distributor to switch from a domestic manufacturer to a new entrant with no installed base. SER0151-52, CSER0736-37.

Foreign or new dispenser manufacturers can obtain effective distribution in the United States only if established distributors can carry their products as a second line. SER0464-71. Because virtually all of the distributors are governed by exclusive dealing contracts, they have refused to take on a second line for fear they will lose their existing line. SER0645. "Under these circumstances, the short term and easy terminability provisions of exclusive dealing arrangements are irrelevant." App. A54 (Pregerson, J., dissenting).[23]

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[23] *See also* Deputy Assistant Attorney General A. Douglas Melamed, *Exclusionary Vertical Agreements*, Remarks Before ABA Antitrust Section Spring Meeting (April 2, 1998) available at

Ignoring this evidence, the Ninth Circuit pointed to Schlumberger's purported entry into the market as "undisputed" evidence that the exclusive dealing policy has not impaired entry. App. A16. The record is quite different. Schlumberger was able to obtain distribution only by buying Southwest Pump, a manufacturer with a weak distribution system. SER0159. Schlumberger then attempted, with little success, to convert Gilbarco and Tokheim distributors. *Id.*; Omega Reply ER Tab 13, at 0048. Schlumberger's National Sales Manager complained that Schlumberger "is having a tough time getting distribution in the country." SER 0161. In four years of effort, Schlumberger was able to pick up only one tiny Gilbarco distributor. SER0645. Since purchasing Southwest in 1991, Schlumberger's 6.0% market share increased only slightly, to a mere 7.7%.[24] CSER190, SER0846.

In sum, nominal contract term can be understood only in light of actual market conditions (*e.g.*, actual contract duration) and imperfections. The Ninth Circuit's decision turns unproven economic assumptions into legal rules in violation of this Court's admonition in *Kodak* and elsewhere that commercial realities, as reflected by facts in the record, must govern antitrust

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http://www.usdoj.gov/atr/speeches/1623.htm (nominal contract length not an economically significant factor; a manufacturer that benefits and gains market power via exclusive dealing can share supracompetitive profits with a distributor and thus retain the exclusive arrangement regardless of the nominal contract duration).

[24] *Cf. Beltone*, 100 F.T.C. at 211-12 (foreign competition "vigorous," with new firms obtaining 34% market share and growing at expense of previously dominant manufacturers).

decisions. Absent intervention by this Court, firms will treat the Ninth Circuit opinion as a green light to impose exclusive dealing, for anticompetitive purposes, so long as they insert a formal termination clause to shield them.

CONCLUSION

Antitrust law is poorly served by rules of *per se* legality based on untested and incomplete economic theories. Economic theory should inform, but not displace factual analysis. The Ninth Circuit's presumptions below conflict with the language and legislative history of the Clayton Act; this Court's decisions in *Standard Stations*, *Tampa Electric*, *Jefferson Parish* and *Kodak*; render fact-finding irrelevant; and vitiate the Rule of Reason. If not corrected, these unrebuttable presumptions will substantially impair antitrust enforcement in the area of exclusive dealing, and vertical restraints generally.

The writ should issue.

Respectfully submitted,

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Dated: May 8, 1998

APPENDIX A

OMEGA ENVIRONMENTAL, INC.
[127 F.3d 1157 (9th Cir. 1997)]

OMEGA ENVIRONMENTAL, INC., a Delaware corporation; ATS Omega, a Texas corporation; Kelley Omega, a Washington corporation; John J. Reynolds, individually; Patrick J. Reynolds, individually; Fedorico Haller, individually; Francisco Calleja, individually; William H. Kelley, individually; Michael J. Reynolds, individually,
Plaintiffs-Appellees,

v.

GILBARCO, INC., a Delaware corporation,
Defendant-Appellant.

OMEGA ENVIRONMENTAL, INC., a Delaware corporation; ATS Omega, a Texas corporation; Kelley Omega, a Washington corporation;
Plaintiffs-Appellants,

and

John J. Reynolds, individually; Patrick J. Reynolds, individually; Fedorico Haller, individually; Francisco Calleja, individually; Fernando Calleja, individually; William H. Kelley, individually; Michael J. Reynolds, individually,
Plaintiffs,

v.

GILBARCO, INC., a Delaware corporation;
Rochester Petroleum Equipment Company,
a Minnesota corporation,
Defendants-Appellees.

Nos. 96-35153, 96-35172 and 96-35594.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 4, 1997.

Decided Oct. 29, 1997.

David J. Burman, Perkins Coie, Seattle, Washington, for plaintiffs-appellees-cross-appellants.

Timothy J. Waters, William H. Barrett, Amy E. Hancock, Robert E. Kohn, McDermott, Will & Emery, Washington, DC, Stephen A. Kroft, McDermott, Will & Emery, Los Angeles, California, Fredric C. Tausend, Hugh F. Bangasser, Ramona M. Emerson, Preston Gates & Ellis, Seattle, Washington, for defendant-appellant-cross-appellee.

J. Thomas Richardson, Cairncross & Hempelmann, Seattle, Washington, for defendant-cross-appellee.

Appeals from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-94-00887-TSZ.

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges.

Opinion by Judge WRIGHT; Dissent by Judge PREGERSON.

EUGENE A. WRIGHT, Circuit Judge.

In this complex antitrust case we must decide, among other issues, whether the district court erred in submitting to the jury the plaintiffs' Clayton Act § 3 exclusive dealing and other state law claims.

I
Background

Manufacturers of petroleum dispensing equipment[1] sell their products, both directly and through authorized distributors, to the owners of retail gasoline outlets, including major oil companies, independent business persons ("jobbers"), national and regional convenience store chains, and independent regional oil companies. Five manufacturers–Gilbarco, Dresser Wayne, Tokheim, Schlumberger, and Bennett–currently compete for these sales in the United States.

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[1] "Petroleum dispensing equipment" includes dozens of products, from the canopies that protect motorists from the rain, to the vapor recovery systems that capture escaping fumes. Only the retail dispensers are here at issue.

Larger customers, such as the major oil companies and national convenience store chains, generally purchase their dispensers directly from the manufacturers through annually negotiated contracts. Major oil companies often negotiate prices for their affiliated jobbers, but the jobbers are not required to purchase their dispensers from their major oil company's principal supplier. Smaller customers typically purchase their dispensers from the approximately 500 authorized dispenser distributors.[2] Although these distributors can and do sell the dispensing equipment of each manufacturer, each is the authorized dispenser distributor of only one manufacturer.

Dispenser manufacturers compete for sales at major oil companies and industry trade shows and during the annual negotiations of their contracts with the major oil companies. Customers purchasing either directly or through authorized distributors typically seek competitive bids before making their purchases. It is undisputed that competition among distributors is intense.

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[2] Another 500-600 companies sell petroleum dispensing equipment other than dispensers. Some of these are appointed "authorized service contractors" ("ASCs"). They provide warranty work and install and repair dispensing equipment, and occasionally become authorized distributors. Plaintiff ATS-Kelley was an ASC before becoming an authorized Gilbarco distributor.

Defendant Gilbarco, Inc. is the market leader in product innovation and improvement,[3] and its products are widely recognized as among the best in the industry. It also leads in sales, capturing roughly 55% of the domestic market for dispensers in 1995. Approximately one-third of its dispenser sales are made directly to end users while the remaining two-thirds are through authorized distributors. These percentages vary greatly among dispenser manufacturers. Dresser Wayne for example, the second-leading dispenser manufacturer, sells over 70% of its dispensers directly to the major oil companies and jobbers.

Gilbarco has some 120 authorized distributors operating under its standard form "Domestic Distributor Agreement." The agreements have an initial term of one year and are thereafter expressly terminable by either party, without cause and without penalty, on 60 days notice.

Plaintiff Omega Environmental, Inc. was organized in 1991. It introduced no manufacturing capacity to the industry, but instead proposed to develop a national service and distribution network by purchasing existing concerns. This network would provide "one-stop shopping" to consumers of petroleum dispensers and related equipment. Each Omega distributor would offer multiple product lines, and the network would engage in consolidated purchasing from manufacturers. To that

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[3] Gilbarco was the first manufacturer to introduce "multi-product dispensers" which allow customers to obtain different grades of fuel from the same dispenser.

end, Omega targeted for acquisition a number of existing distributors and servicers, including two authorized Gilbarco distributors, plaintiffs ATS-Omega ("ATS") and Kelley-Omega ("Kelley").

In December 1993, in response to Omega's introduction of a distribution strategy at odds with its own, Gilbarco had internal meetings and met separately with its Distributor Advisory Council and Omega representatives. In February 1994, Gilbarco notified each of its authorized distributors that it intended to "continue to do business with service station equipment distributors who [s]ell only the Gilbarco line of retail dispensers." Accordingly, it notified Kelley, acquired by Omega in 1993, that its distributorship agreement would not be renewed. In April 1994, one month after Omega purchased ATS, Gilbarco gave ATS 60 days notice that it was terminating their agreement. This suit followed.

Plaintiffs alleged three distinct antitrust claims under the Sherman and Clayton Acts and their state law counterparts. They claimed that Gilbarco and several distributors, including the Distributor Advisory Council chair, defendant Rochester Petroleum Equipment, Inc., had conspired to maintain resale prices for petroleum dispensing equipment and to allocate territories and customers in violation of § 1 of the Sherman Act and Wash. Rev. Code § 19.86.030. They also alleged that the defendants had conspired to monopolize, and attempted to monopolize, the market for the sale of petroleum dispensing equipment in violation of § 2 of the Sherman Act and Wash. Rev. Code § 19.86.040. In their final antitrust claim, plaintiffs contended that Gilbarco's policy violated § 3 of the Clayton Act and Wash. Rev. Code

§ 19.86.050. In addition to their antitrust claims, plaintiffs asserted that Gilbarco engaged in unfair competition in violation of Wash. Rev. Code § 19.86.020, breached contractual obligations, made negligent misrepresentations, and tortiously interfered with business relations.

The district court granted summary judgment to Gilbarco on the Sherman Act claims and their state-law counterparts. After the plaintiffs' case-in-chief, the court dismissed two contract claims and ATS's and Kelley's tortious interference claims on Gilbarco's motion for judgment as a matter of law. The jury returned a verdict against Gilbarco on each claim submitted for its decision: exclusive dealing, unfair competition, breach of contract, negligent misrepresentation and tortious interference. The district court determined that the damage awards on these claims were duplicative, and gave judgment against Gilbarco on the single claim which represented the largest award to each plaintiff. Aggregated, these awards totalled $9,000,000, which the court trebled. It denied plaintiffs' request for injunctive relief. Gilbarco renewed its motion for judgment as a matter of law on each claim. The district court denied the motion in a one-sentence minute order. It awarded to the plaintiffs attorney's fees and costs exceeding $1,000,000.

Gilbarco appeals from the denial of its motion for judgment as a matter of law on each claim, from the $27,000,000 judgment, and from the fee award. Omega cross appeals the summary judgment on its Sherman Act § 1 claim, the denial of injunctive relief, and the reduction of the damage award.

II
Standards of Review

We review *de novo* the denial of a renewed motion for judgment as a matter of law, using the same standard as the district court. Judgment as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir.1993). Applying this standard, we are mindful of the Supreme Court's admonition that, in antitrust cases, "a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243, 113 S.Ct. 2578, 2598, 125 L.Ed.2d 168 (1993).

We also review *de novo* the district court's interpretation of state law, *Huey v. Honeywell, Inc.*, 82 F.3d 327, 329 (9th Cir.1996), and the application of that law to undisputed facts, *Boone v. United States*, 944 F.2d 1489, 1492 (9th Cir.1991).

III
Analysis

A. Exclusive Dealing

Section 3 of the Clayton Act provides:

> It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser

> thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly.

15 U.S.C. § 14.

The main antitrust objection to exclusive dealing is its tendency to "foreclose" existing competitors or new entrants[4] from competition in the covered portion of the relevant market during the term of the agreement. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 383 (7th Cir.1984) (Posner, J.). There are, however, well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition. *See e.g. id.* at 395; *Joyce Beverages of N.Y. Inc. v. Royal Crown Cola Co.*, 555 F.Supp. 271, 277-78 (S.D.N.Y.1983). And, as then-Judge Breyer noted, in the analogous context of requirements contracts, "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir.1983). We thus analyze challenges to exclusive dealing arrangements under the antitrust rule of reason. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1302 (9th

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[4] Plaintiffs cast their argument in terms of "entry barriers," while Gilbarco discusses "foreclosure from the relevant market." Aside from the status of the allegedly affected competitors, i.e., incumbent firms or new entrants, we perceive little meaningful difference.

Cir.1982); see *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 627-28, 5 L.Ed.2d 580 (1961); *Roland*, 749 F.2d at 393. Only those arrangements whose "probable" effect is to "foreclose competition in a substantial share of the line of commerce affected" violate Section 3. *Tampa Elec.*, 365 U.S. at 327, 81 S.Ct. at 627-28; *Twin City*, 676 F.2d at 1304 n. 9; *see also Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45, 104 S.Ct. 1551, 1576, 80 L.Ed.2d 2 (1984) (O'Connor, J. concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

The parties agree that the plaintiffs have correctly defined the relevant market as the "the sale of retail gasoline dispensers from manufacturers in the United States." Plaintiffs contend, however, that Gilbarco's policy forecloses from competition 24% of the available *distributors*. The focus on this subset of the relevant market is misplaced:

> The foreclosure effect, if any, depends on the market share involved. The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.

2A Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 570b1 at 278 (1995); *see also Tampa Elec.*, 365 U.S. at 330-33, 81 S.Ct. at 629-31.

The foreclosed market, in purely quantitative terms, is more accurately described as the percentage of Gilbarco's total market share sold through its authorized distributors. Seventy percent of Gilbarco's total dispenser sales are through distributors, and it captured 55% of the total market in 1995. Construing this evidence in the plaintiffs' favor, the jury could reasonably have concluded that Gilbarco's policy foreclosed roughly 38% of the relevant market for sales. Although 38% appears significant, *see e.g. Twin City,* 676 F.2d at 1304 (holding that 24% foreclosure for an unreasonable length of time is substantial), we conclude that it "considerably overstates the size of the foreclosure and its likely anti-competitive effect for several reasons." *Barry Wright,* 724 F.2d at 237.

First, exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern. *Ryko Mfg. Co. v. Eden Services,* 823 F.2d 1215, 1235 (8th Cir. 1987) ("Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of 'substantial foreclosure.'"). If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market. *See generally* ABA Antitrust Section, Monograph No. 8, *Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others*, 92 (1982); Richard M. Steuer, *Exclusive Dealing in Distribution,* 69 Cornell L.Rev. 101, 118-124 (1983); Herbert Hovenkamp, *Federal Antitrust Policy* § 10.8 at 391 (1994) (foreclosure of even "a large percentage of one mode of

distribution will have little anticompetitive effect if another mode is available.")

The record contains undisputed evidence that direct sales to end-users are an alternative channel of distribution in this market. Gilbarco, Dresser Wayne, Tokheim, Schlumberger and Bennett respectively make 30%, 73%, 35%, 15%, and 15% of their sales without the aid of distributors. The plaintiffs' own expert testified that these direct purchases fall within the relevant market.

The record also contains undisputed evidence of potential alternative sources of distribution. Existing companies, such as the service contractors that regularly sell and service petroleum dispensing equipment, can and do become authorized dispenser distributors. ATS, for example, was an ASC before becoming an authorized Gilbarco distributor, and neither it nor Kelley had been distributors prior to becoming Gilbarco distributors. Their own experiences refute their theory.[5]

Contrary to plaintiffs' contention, these alternatives are relevant to assessing market foreclosure. *See* 2A Areeda ¶ 570b1 (foreclosure calculation "includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations"); *cf. Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th

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[5] The ASCs do not operate under exclusive arrangements, which renders them even more accessible to competitors.

Cir.1989) (relevant market includes "all sellers or producers who have actual or potential ability to deprive each other of significant levels of business"); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1446 (9th Cir.1988) (relevant product market includes things that "enjoy reasonable interchangeability of use and cross-elasticity of demand."). These alternatives eliminate substantially any foreclosure effect Gilbarco's policy might have. Omega nonetheless complains that they are inadequate substitutes for the existing distributors: "[A]lmost all [of] the 500 existing distributors–who have proven finances, abilities and customer relationships–are restricted by exclusive dealing." The short answer is that the antitrust laws were not designed to equip the plaintiffs' hypothetical competitor with Gilbarco's legitimate competitive advantage. *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 979 (9th Cir.1983) ("[A] defendant, having succeeded in legitimately controlling 'the best, most efficient and cheapest source of supply,' . . . does not have to share 'the fruits of its superior acumen and industry.'") (citing *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F.Supp. 645, 648 (N.D.Cal.1979)); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir.1991) (no anticompetitive impact where plaintiffs not foreclosed from every alternative). Competitors are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors. Antitrust laws require no more.

Second, the short duration and easy terminability[6] of these agreements negate substantially their potential to foreclose competition. *See Roland*, 749 F.2d at 394-95 (one-year contracts presumptively legal); *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir.) (Easterbrook, J.) (same), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2435, 138 L.Ed.2d 196 (1997); *Barry Wright*, 724 F.2d at 237 (two-year contracts reasonable); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir.1993) (termination on 30 days notice normally a *de minimis* constraint); *In re Beltone Electronics Corp.*, 100 F.T.C. 68, 210 (1982) (termination on thirty days notice an "escape valve" diluting the limitation on access to distributors). Because *all* of Gilbarco's distributors are available within one year, and *most* (90% according to the plaintiffs) are available on 60 days notice, a competing manufacturer need only offer a better product or a better deal to acquire their services. *See* 2A Areeda ¶ 420c at 60 ("Antitrust . . . regards impediments as 'barriers' if they deter entry for a sufficiently long time."); *id.* ¶ 421f at 68 ("[A]ll customers might contract to buy exclusively from incumbents and yet allow effective entry if

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[6] Paragraph 11(a) of Gilbarco's Domestic Distributor Agreement provides:

> This Agreement shall have an initial term of one (1) year from the date first written above and continue thereafter until terminated. Either party shall have the option to terminate this Agreement, with or without cause, at the end of such initial term or at anytime thereafter upon sixty (60) days prior written notice.

20 percent of the contracts expire monthly (or even annually).").

Plaintiffs' expert opined that no distributor would abandon the Gilbarco line for an untested product with no reputation. We agree with the unremarkable proposition that a competitor with a proven product and strong reputation is likely to enjoy success in the marketplace, but reject the notion that this is anticompetitive. It is the essence of competition. *See American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 108 F.3d 1147, 1154 (9th Cir.1997) ("[R]eputation alone does not constitute a sufficient entry barrier in this Circuit."); *United States v. Syufy Enterprises*, 903 F.2d 659, 669 (9th Cir.1990) ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.").

Nor did plaintiffs produce credible evidence to support their contention that Gilbarco's policy actually deterred entry into this market.[7] The actual entry and expansion of Schlumberger in 1991, through the purchase of a small dispenser manufacturer, Southwest,

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[7] Plaintiffs contend that Koppens and Tatsuno, two foreign dispenser manufacturers, were deterred by exclusive dealing, but cite no credible supporting evidence. The testimony of Roy Sutton, president of Goode-Omega, that Koppens' entry failed due to a lack of distribution is insufficient for two reasons. First, it was admitted speculation, which the jury was not entitled to credit. Second, even if the jury were entitled to rely on his testimony, it is insufficient to establish that exclusive dealing caused the failed distribution.

demonstrate the contrary. The record shows that Schlumberger has built a substantial distribution network since it entered the market. Plaintiffs' witnesses testified that when Schlumberger bought Southwest, it "didn't have much distribution," and was "the joke of the industry," but that by trial Schlumberger had "something over . . . 100 distributors" (which plaintiffs now count as among those with "proven finances, abilities and customer relationships"). And, although the parties contest the extent of the increase, it is undisputed that Schlumberger's market share has increased since its entry by at least one third (from approximately 6% to 8%), while industry output in the retail dispenser market has expanded substantially. This undisputed evidence precludes a finding that exclusive dealing is an entry barrier of any significance. *Syufy Enterprises*, 903 F.2d at 665.

Our discussion of the mitigating effect of the contracts' short duration and easy terminability also disposes of plaintiffs' contention that the agreements harm competition by facilitating tacit price coordination among dispenser manufacturers. They argue, essentially, that exclusive dealing limits the ability of distributors to extract lower prices from manufacturers by forcing the manufacturers to bind against each other. If the policy facilitates collusion by limiting the distributors' ability to obtain better prices, it does so in most cases for no more than 60 days. *See* Hovenkamp § 10.8b at 384-85 (Although "[e]xclusive dealing may facilitate collusion by denying buyers an opportunity to force sellers to bid against each other," if the "contracts must be re-bid frequently, most of the benefits of

exclusive dealing will be retained, but the competitive threat will be greatly diminished.").

Nor are we persuaded that a jury could reasonably infer probable injury to competition even in this highly concentrated market where the undisputed evidence shows increasing output, decreasing prices, and significantly fluctuating market shares among the major manufacturers. *Cf. Brooke Group*, 509 U.S. at 237, 113 S.Ct. at 2595 (holding that, under Robinson-Patman Act, jury may not infer conscious parallelism or supracompetitive pricing even in highly concentrated industry where output is expanding and prices are *increasing*).

We conclude that, even construed in the light most favorable to Omega, the evidence presented did not support the jury's verdict. The district court erred by denying Gilbarco's motion for judgment as a matter of law on the Clayton Act claim.[8]

B. State Law Claims

1. Breach of contract

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[8] The Washington exclusive dealing statute, Wash. Rev. Code § 19.86.050, contains language substantially similar to the Clayton Act, and the plaintiffs' unfair competition claim under Wash. Rev. Code § 19.86.020 is premised on exclusive dealing. Because construction of these provisions is to be "guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters," Wash. Rev. Code § 19.86.920, our conclusion with regard to the Clayton Act claim disposes of these claims.

In the only contract claim submitted for its decision, the jury found that Gilbarco had breached ¶ 8(a) of the agreements, which requires compliance with "all applicable laws," by enforcing the exclusive dealing policy allegedly in violation of N.C.Gen.Stat. § 75-5(b)(2).[9] Gilbarco contends that it was entitled to judgment as a matter of law because North Carolina law is not "applicable" to the enforcement of Gilbarco's policy outside of North Carolina and, even if it is, Gilbarco did not violate the statute. Because we conclude that plaintiffs failed to demonstrate that Gilbarco violated the statute, we need not examine its extraterritorial reach.

Exclusive arrangements violate this statute only when they absolutely prohibit dealing in competitive goods. *McDaniel v. Greensboro News Co.*, 1984-1 Trade Cas. (CCH) ¶ 65,792 at 67,287 (M.D.N.C.1983) (citing *Arey v. Lemons*, 232 N.C. 531, 61 S.E.2d 596, 600 (1950)); *Baynard v. Service Distributing Co. Inc.*, 78 N.C.App. 796, 338 S.E.2d 622, 623 (1986) ("Plaintiff was not allowed to and did not buy gasoline from any other source."); 14 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 165.01[3] (1996). Here, undisputed evidence shows that the plaintiff distributors could and did sell the dispensers of competing manufacturers. The policy prohibited them only from becoming *authorized distributors* of a competing line of dis-

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[9] The statute renders it "unlawful for any person . . . to [sell], or to have any contract . . . [t]o sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor." The statute was repealed "to ensure" that North Carolina's antitrust laws are "consistent with federal antitrust laws." 1995 N.C. Sess. Laws 550.

pensers. Because the policy is not an absolute prohibition on dealing in competitive goods, but only a restriction on how many plaintiffs may deal in those goods, as a matter of law, it does not violate § 75-5(b)(2).

2. Negligent misrepresentation

ATS and Kelley argued that, notwithstanding the short-term, expressly terminable agreements, Gilbarco induced them into making capital investments, hiring more employees, and buying additional inventory by stating that they had long-term "partnering" relationships based on mutual trust. Washington follows the *Restatement (Second) of Torts* § 552 (1977), which provides:

> One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating such information.

Havens v. C & D Plastics, Inc., 124 Wash.2d 158, 876 P.2d 435, 447 (1994). "The proof must be clear, cogent, and convincing." *Id.* (citation omitted).

Soon after the plaintiffs signed their agreements with Gilbarco, they received welcoming letters to the "Gilbarco Team" and saying that Gilbarco looked for-

ward to their "partnership."[10] Two Gilbarco executives testified that it generally looked for and valued long-term "partnership-type" relationships, and one testified that "partnership" was a common theme.

These statements cannot establish negligent misrepresentation under Washington law. In *Havens*, the plaintiff asserted a claim based on similar statements made by the defendant during employment negotiations. The Washington Supreme Court, affirming a directed verdict for the defendant, said:

> Defendants stated that they were looking forward to a long and prosperous future together, and Plaintiff testified that he told Defendants that he expected to remain at Northwest Composites until he retired . . . . [S]uch statements by defendants are consistent with the general expectation present in any such negotiation: the employer was hoping for and expecting a long-term, mutually satisfactory relationship.

876 P.2d at 444. Such statements, the court held, "cannot establish a promise on which to base a negligent misrepresentation claim." *Id.* at 447. We conclude that *Havens* requires reversal on the negligent misrepresentation claim.

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[10] John Reynolds testified that while he was negotiating for his distributorship, Gilbarco's district manager told him that he "was looking for a long-term distributor. As their agreement or their letter says, a partnership."

3. Tortious interference

Omega argued, and the jury found, that by terminating ATS and Kelley, Gilbarco tortiously interfered with Omega's attempted acquisition of three Gilbarco distributors. In Washington, the elements of tortious interference are:

> (1) The existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage.

Pleas v. City of Seattle, 112 Wash.2d 794, 774 P.2d 1158, 1161 (1989) (en banc).

"The third element, intent, denotes purposefully *improper* interference." *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash.App. 1, 776 P.2d 721, 726 (1989) (emphasis supplied). The plaintiff must prove that the defendant either pursued "an improper objective of harming the plaintiff" or used "wrongful means" that caused injury in fact. *Id.* 776 P.2d at 727 (quoting *Pleas*, 774 P.2d at 1163). "Asserting one's rights to maximize economic interests does not create an inference of ill will or improper purpose." *Id.*

Undisputed evidence shows that Gilbarco neither pursued an improper objective nor used wrongful means. Gilbarco, rightly or wrongly, perceived that Omega's acquisition of its distributors conflicted with Gilbarco's

economic interests.[11] Under Washington law, it clearly had the right to decline to do business with the purchaser of its distributors. *Id.* To that end, it exercised its express contractual right to cancel its distribution agreement with ATS and Kelley after they were acquired by Omega.

IV
Plaintiffs' Cross Appeal

Plaintiffs cross appeal the summary judgment on their Sherman Act § 1 claims.[12] We review *de novo*. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996).

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[11] Omega cites to the testimony of Walter Gavin, sales manager of Gilbarco North America, in support of its argument. We believe that it succinctly demonstrates why Omega's claim fails as a matter of law:

> A. The policy had to do with dealing with competitors that were owned by competitors or dealing with companies that had multi brands of equipment. It so happened that Omega was a company that fit that description. [ ] We would have made the same decision if it were some other company rather than Omega . . . .
>
> Q: And you knew it would interfere with Omega's . . . ability to acquire other Gilbarco distributors, correct?
>
> A: Well, yeah, I guess it would do that. But I'm not interested in what is good for Omega. I'm interested in what is good for Gilbarco. And it's clear to me that dealing with Omega is not good for Gilbarco. Good luck, go out and compete.

[12] Our conclusion in the main appeal obviates the need to address plaintiffs' other contentions.

In granting summary judgment on the plaintiffs' claim that the defendants engaged in a concerted refusal to deal, the district court concluded that plaintiffs (1) failed to produce evidence of concerted action sufficient to withstand summary judgment, and (2) failed either to allege facts sufficient to warrant application of the per se rule or to produce evidence to withstand summary judgment under the rule of reason. In a lone paragraph in their 55-page opening brief, plaintiffs contend that they proved that Rochester Petroleum and Gilbarco agreed to refuse to deal with Omega.[13] Only in their reply brief do they address the reasonableness of the alleged restraint. They contend that they could properly omit this contention from their opening brief "because the district court erred in concluding that the concerted action alleged here was not a per se violation."

We firmly reject the startling proposition that these plaintiffs were entitled *to assume* in their opening brief, unknown to this court and the defendants, that an essential element of the district court's holding was incorrect. Plaintiffs could *argue* that the court erred, but they neglected to do so. We decline to address an argument raised for the first time in the reply brief. *See Cross v. State of Washington*, 911 F.2d 341, 345 (9th

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[13] Plaintiffs also contend that they proved that Rochester and Gilbarco agreed to the exclusive dealing policy in restraint of trade. Our conclusion that Gilbarco's distributor policy did not violate the Clayton Act disposes of this contention. If an exclusive dealing arrangement "does not fall within the broader proscription of § 3 of the Clayton Act[,] it follows that it is not forbidden by [§§ 1 and 2 of the Sherman Act]." *Tampa Electric*, 365 U.S. at 335, 81 S.Ct. at 632.

Cir.1990). Because plaintiffs have failed to present a sufficient basis to reverse the summary judgment, we affirm.

No. 96-35153 **REVERSED, VACATED AND REMANDED.**

No. 96-35172 **AFFIRMED.**

No. 96-35594 **VACATED.**

PREGERSON, Circuit Judge, dissenting:

I dissent from the part of the majority's opinion that holds that the district court erred in denying Gilbarco's motion for judgment as a matter of law on the Clayton Act § 3 claim. The district court properly instructed the jury. Substantial evidence in the record supports the jury's verdict. In holding to the contrary, the majority misapplies the proper standard of review and misconstrues Supreme Court and Ninth Circuit precedent in articulating the elements of a Clayton Act § 3 claim.

The standard for reviewing a jury verdict is whether the jury verdict is supported by "substantial evidence," that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *See Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996); *see also Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir. 1992) ("Challenges to the sufficiency of the evidence, and the denial of a motion for judgment notwithstanding the verdict, are reviewed de novo to determine if the

plaintiff's claims were supported by substantial evidence."). The credibility of the witnesses and the weight of the evidence are issues for the jury and are generally not subject to appellate review. *See Murray*, 55 F.3d at 1452.

Thus, our duty is limited to determining if substantial evidence exists in the record to support the jury's verdict. The majority, however, cites only to those parts of the record that support its conclusion, and neglects to mention those facts that support the jury's verdict. This approach might be suitable for a trier of fact, but it is not suitable for a court of appeals that is reviewing the verdict of a properly instructed jury.

A fair reading of the extensive trial record shows more than substantial evidence to support each element of a Clayton Act § 3 claim.

Omega presented evidence to establish the following:

- Gilbarco dominates the retail petroleum dispenser market.

- The number of established distributors of retail petroleum dispensers in the United States is limited to five hundred.

- Gilbarco uses exclusive dealing arrangements to prevent its distributors from carrying any competing brands of retail petroleum dispensers.

- Gilbarco's use of exclusive dealing arrangements forecloses 38% of the total retail petroleum dispenser market.

- Gilbarco's use of exclusive dealing arrangements creates entry barriers for new manufacturers of retail petroleum dispensers.

- Gilbarco's use of exclusive dealing arrangements inflates the prices at which existing manufacturers sell retail petroleum dispensers to their distributors.

These facts constitute substantial evidence in support of the jury's verdict finding Gilbarco liable for violating § 3 of the Clayton Act.

I. BACKGROUND

A. The United States Market for Retail Petroleum Dispensers

A few firms manufacture the vast majority of the retail petroleum fuel dispensers sold in the United States. These firms are Gilbarco, Dresser-Wayne, Tokheim, and Schlumberger. Gilbarco has 55% of the market, Dresser-Wayne has 18%, Tokheim has 16.1%, and Schlumberger has 7.7%. Omega's expert, Professor Leffler,[1] testified that the retail petroleum dispenser industry is an oligopoly dominated by Gilbarco, with

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[1] Professor Leffler is a Professor of Economics from the University of Washington. Professor Leffler has expertise in the subject of exclusive dealing arrangements.

Dresser-Wayne and Tokheim being the other two significant manufacturers. In the past, several manufacturers of retail petroleum dispensers attempted and failed to enter the retail petroleum dispenser market in the United States because they could not obtain or create distributors.

Five hundred distributors sell and service petroleum fuel dispensers in the United States. These five hundred distributors specialize in parts and pieces "specific to the construction of underground fuel systems and the specialized materials used for building gas stations and fleet fueling or airport fueling systems."

These distributors offer over one hundred products and services, e.g., commercial gasoline dispensers,[2] POS systems, credit card readers, vapor recovery systems, canopies, and tanks. Of all the products offered by petroleum equipment manufacturers, the most important product is the petroleum dispenser. In the words of Gilbarco's sales manager for North America, "[petroleum dispensers] are the core of our business."

Gilbarco prohibits its distributors from carrying more than one brand of retail petroleum dispenser. Dresser-Wayne and Tokheim also have a policy of

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[2] A "retail" petroleum dispenser is sold by the manufacturer to an official distributor at a wholesale price, for re-sale by the distributor to an end-user at retail price. A "commercial" petroleum dispenser is sold by an official distributor to a buyer at a price above wholesale. Distributors of different brands of "retail" petroleum dispensers can purchase "commercial" petroleum dispensers from each other at this higher price.

allowing their distributors to carry only one brand of retail petroleum dispenser. Gilbarco's standard contract with its distributors has an initial term of one year and is terminable on sixty days notice.

B. Omega's Entry

In 1991, Omega attempted to introduce a new way to deliver petroleum dispensing equipment and services to buyers. It wanted to create a network of distributors and other service providers that could offer prospective buyers "one-stop" shopping. One advantage to such a network is that it would allow buyers to compare many different brands of products, including retail petroleum dispensers. According to Professor Leffler, Omega's plan offered an ideal way for a new entrant into the retail petroleum dispenser market to distribute its products.

Important in this one-stop shopping idea was recruiting distributors who could install the petroleum dispensers and service them over a long period of time. To this end, Omega contacted existing distributors of retail petroleum dispensers. One such distributor joined the Omega network because he believed he could purchase parts from Omega "at a very small markup cost . . . as opposed to paying fifteen or twenty percent markup."

Gilbarco distributors who only carried one line of retail petroleum dispenser became worried about the possible effects of Omega's proposed venture on their businesses. One Gilbarco distributor testified at trial that he did not want to face competition from Omega as a company that could offer more than one line of equip-

ment, charge cheaper prices, and be the "Walmart" of the industry. This distributor was concerned that Omega distributors would gain sales at his expense by offering more choices to customers and "play[ing] one . . . manufacturer [of retail petroleum dispensers] off against another to get lower prices."

A second Gilbarco distributor wrote a letter to Gilbarco stating the following: "I feel that a Gilbarco distributor purchased by Omega should be cancelled immediately. I repeat: They are very dangerous."

C. Retaliation Against Omega

On December 7, 1993, representatives of Omega met with representatives of Gilbarco. In the December meeting, Omega disclosed that it planned to issue catalogs and "provide one-stop shopping for customers."

Gilbarco reacted negatively to the prospect of interbrand price competition for retail petroleum dispensers. Gilbarco's sales manager for North America testified that he feared that Omega might become a large enough distributor to insist upon volume discounts. Gilbarco also did not want Omega to publish throughout the marketplace the lower prices that Gilbarco was able to offer to major oil companies.

At a Gilbarco Distributor Advisory Council ("DAC")[3] meeting held on December 15, 1993, Gilbarco

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[3] Gilbarco communicates to its distributors through its DAC. The other major manufacturers of retail petroleum dispensers also use DACs.

representatives expressed their concerns about Omega. Distributors at the Gilbarco DAC meeting stated that it would be difficult to compete against Omega. These distributors asked Gilbarco to cancel any distributorship that became a part of Omega.

Gilbarco reminded distributors of its exclusive dealing policy in a February 8, 1994, memorandum stating:

> [I]t is [Gilbarco's] general intention to continue to do business with service station equipment distributors who:
>
> — Sell only the Gilbarco line of retail dispensers;
>
> — Are not owned by competing companies; and
>
> — Sell in an export market only with the agreement of the local Gilbarco distributor.

II. ELEMENTS OF A CLAYTON ACT § CLAIM

Section 3 of the Clayton Act states that

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser

> thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

The type of contract at issue in this case is an exclusive dealing arrangement. "In practical application, even though a contract is found to be an exclusive-dealing arrangement, it does not violate the [Clayton Act] unless the court believes it probable that performance of the contract will foreclose competition in a substantial line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961). In determining whether an exclusive dealing arrangement violates § 3 of the Clayton Act, a factfinder should consider the following: (1) "the line of commerce, i.e., the type of goods, wares, or merchandise, etc., involved must be determined . . . based on the facts peculiar to the case," (2) the area of competition, i.e. "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies,"[4] and (3) whether "the competition fore-

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[4] The Supreme Court in *Tampa* also referred to the area of competition as the "relevant market." *See Tampa*, 365 U.S. at 328, 81 S.Ct. at 628-29.

closed by the contract [constitutes] a substantial share of the relevant market." *Tampa*, 365 U.S. at 327-28, 81 S.Ct. at 628.

The critical issue in this case is the third *Tampa* factor: whether "the competition foreclosed by the contract [constitutes] a substantial share of the relevant market." *Id.* at 328, 81 S.Ct. at 628. Numbers alone do not decide the question. In discussing "substantiality," the Supreme Court instructed that

> [I]t is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Id. at 329, 81 S.Ct. at 629.

In *Tampa*, the Supreme Court noted that the challenged exclusive dealing arrangement in that case did not substantially foreclose competition in the relevant market in part because there was no "seller with a dominant position in the market" nor an "industry-wide practice of relying upon exclusive contracts." *See Id.*

The Supreme Court revisited the issue of substantial foreclosure of competition in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80

L.Ed.2d 2 (1984). In *Jefferson Parish*, the plaintiff anesthesiologist challenged the exclusive arrangement that a hospital had with a group of anesthesiologists whereby the hospital would allow only that group of anesthesiologists to provide services at the hospital. The Court ruled:

> The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred [plaintiff's] services to those of [defendants], but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.

Jefferson Parish, 466 U.S. at 30, 104 S.Ct. at 1567.

In a concurring opinion, four Justices concluded that there was no substantial foreclosure on competition.

> A firm of four anesthesiologists represents only a very small fraction of the total number of anesthesiologists whose services are available for hire by other hospitals, and [the hospital] is one among numerous hospitals buying such services. Even without engaging in a detailed analysis of the size of the relevant markets we may readily conclude that there is no likelihood that the exclusive dealing arrangement challenged

> here will either unreasonably enhance the Hospital's market position relative to other hospitals, or unreasonably permit [the four anesthesiologists] to acquire power relative to other anesthesiologists. Accordingly, this exclusive dealing arrangement must be sustained under the Rule of Reason.

Id. at 45-46, 104 S.Ct. at 1576 (O'Connor, J., concurring).

Tampa and *Jefferson Parish* suggest that the court should consider the following general considerations in deciding whether a challenged exclusive dealing arrangement in a market forecloses a substantial share of that market: (1) the dominance of the seller; (2) the existence of an industry-wide practice of exclusive dealing; (3) the proportion of affected commerce in comparison to the entire market; and (4) the probable effect immediately and in the future of the exclusive dealing, including effects on the ability of the consumer to change products. *See Tampa*, 365 U.S. at 329, 81 S.Ct. at 629; *see also Jefferson Parish*, 466 U.S. at 30, 104 S.Ct. at 1567-68.

Determining if the foreclosure of the market here is substantial requires more than a review of individual considerations, however. Under the "Rule of Reason," the trier of fact must determine if the exclusive dealing arrangement is reasonable. *See Jefferson Parish*, 466 U.S. at 45-46, 104 S.Ct. at 1575-76 (O'Connor, J., concurring). "The reasonableness inquiry asks whether the restraint in question is one that promotes competition or one that suppresses competition." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d

1291, 1304 (9th Cir. 1982) (internal quotation marks omitted).[5]

The majority shortchanges the analysis required by *Tampa*, *Jefferson Parish*, and *Twin City* when it states that "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern." Majority Opinion at 1162-63 (citing *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1235 (8th Cir. 1987)). In *Ryko*, the Eighth Circuit Court of Appeals asserted that a higher standard of proof of "substantial foreclosure" is required "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level." *Ryko*, 823 F.2d at 1235.

There is no Supreme Court or Ninth Circuit precedent that adopts this rule. *Tampa*, *Jefferson*, and *Twin City* all call for individualized examination of an alleged substantial foreclosure. *See Tampa*, 365 U.S. at 329, 81 S.Ct. at 629 (listing several factors to consider in evaluating "substantiality"); *Jefferson*, 466 U.S. at 29, 104 S.Ct. at 1567 (calling for "inquiry into actual effect of the exclusive contract on competition"); *Twin City*, 676

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[5] Both *Jefferson* and *Twin City* involved examinations of the anticompetitive effect of exclusive dealing arrangements under section one of the Sherman Act. 15 U.S.C. § 1. In *Twin City*, we held that "a greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section three Clayton Act violation in exclusive-dealing cases." *Twin City*, 676 F.2d at 1304 n. 9. Thus, less evidence is needed to preserve a jury verdict on a § 3 Clayton Act claim on appeal than would be needed to preserve a jury verdict on a Sherman Act claim.

F.2d at 1302 (holding that a defendant's antitrust liability depends on "the overall effects of a defendant's conduct in the relevant market"). These cases do not suggest that a different standard should be used to evaluate exclusive dealing arrangements depending upon whether they restrict end-users or distributors. It bears repeating that the ultimate issue is "whether the restraint in question is one that promotes competition or one that suppresses competition." *Twin City*, 676 F.2d at 1304. There is no reason to deviate from this standard by imposing a general presumption which fails to account for the unique circumstances of the market in question.

The majority also creates an unnecessary presumption by concluding that the short contract length and terminability on sixty days notice of Gilbarco's distributorship agreements "negate substantially their potential to foreclose competition." Majority Opinion at 1163 (citing *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 394-95 (7th Cir.1984); *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2435, 138 L.Ed.2d 196 (1997); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 237 (1st Cir.1983); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir.1993); *In re Beltone Electronics Corp. et al.*, 100 F.T.C. 68, 210 (1982)).

The majority's approach in coming to this conclusion fails to consider the context of the relevant market in which the exclusive dealing arrangements are used. Although the majority does not state a per se rule that any short term contract that is terminable on short notice *cannot* give rise to a violation under § 3 of the Clayton

Act, I fear that such a rule may eventually emerge from the precedent created by the majority's opinion.

In discussing the short length and terminability provisions of the Gilbarco distributorship agreements, the majority cites to several out-of-circuit cases. Close scrutiny of those cases show that they do not necessarily support the majority's position.

In *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir.1984), the Seventh Circuit Court of Appeals reviewed a district court's preliminary injunction prohibiting a manufacturer of farm machinery from terminating its contract with a distributor. The manufacturer's reason for terminating was the distributor's decision to sell farm machinery from a competitor. The court in *Roland* held that the distributor had to prove two things in order to show that the exclusive dealing agreement was unreasonable:

> First, he must prove that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, he must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.

Roland, 749 F.2d at 394.

The court in *Roland* concluded that the distributor had not presented adequate evidence to meet this standard for purposes of the preliminary injunction. On the contrary, the evidence suggested that the competing manufacturer could not be kept out of the relevant market because of its size and dominance in the world market:

> [The competing manufacturer] is the second largest manufacturer of construction equipment in the world. Its total sales of such equipment are four times as great as [the manufacturer's]. Already it is a major factor in the U.S. construction equipment market; in some items it outsells [the manufacturer]. The nationwide practice of exclusive dealing has not kept [the competing manufacturer] from becoming a major factor in the U.S. market, apparently in a short period of time.

Id.

The *Roland* court speculated that the competing manufacturer was able to gain a competitive position because the exclusive dealing arrangements in that case were terminable on ninety days notice. *See Id.* It then stated that "[e]xclusive dealing contracts terminable in less than a year are presumptively lawful under section 3 [of the Clayton Act]." *Id.* at 395 (citing to ABA Antitrust Section, Antitrust Law Developments 98 (2d ed.1984); Sullivan, Handbook of the Law of Antitrust 485-86 (1977); *cf.* Marvel, Exclusive Dealing, 25 J. Law

& Econ. 1, 6 (1982). Nevertheless, the court in *Roland* did not "exclude the possibility that on the full record made in the trial on the merits, [the distributor] will succeed in establishing its claim." *Id.* at 396.

The decision in *Roland* is distinguishable. *Roland* involved a market where a new competitor had come into the market and was successfully competing. In addition, the new competitor had vast resources that dwarfed its rivals who were using exclusive dealing arrangements.

By contrast, the present case involves exclusive dealing arrangements used by Gilbarco, the dominant firm in the relevant market. Over time, few competitors have *successfully* entered the market.[6] Most importantly, the *Roland* court held that the distributor *might prove at time of trial* that the exclusive dealing arrangements, terminable on ninety days notice, did foreclose competition in the relevant market. The majority does not allow for that possibility in this case.

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[6] The majority points to the entry of Schlumberger as evidence that new manufacturers of retail petroleum dispensers could enter the United States market. The evidence presented at trial regarding Schlumberger was mixed. Professor Leffler testified that Schlumberger has *not* been successful in establishing a distribution network and still does not have representation in all parts of the United States. We are not free to disturb the jury's decision to believe the substantial evidence presented at trial that entry barriers do prevent new manufacturers from entering the United States retail petroleum market.

Furthermore, I do not agree with the holding made by the court in *Roland* that exclusive dealing arrangements that are terminable in less than a year are presumptively legal. The court in *Roland* cited to no case law and relied only on law review articles and other secondary authority in coming to this conclusion. I know of no Ninth Circuit precedent that supports the holding made by the *Roland* court. In addition, I believe that this presumption of legality for exclusive dealing arrangements that are terminable in less than a year is contrary to the Supreme Court's instructions in *Tampa*, which call for the trier of fact to make an individualized determination of the anticompetitive effects of an exclusive dealing arrangement in the particular relevant market. *See Tampa*, 365 U.S. at 327-28, 81 S.Ct. at 627-29.

Nor is the majority's citation to *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1996), persuasive. In *Paddock*, the Seventh Circuit addressed a small newspaper's claim that its competitors' agreements with news services that allowed the news services to provide material only to the competitors violated § 3 of the Clayton Act. The court explicitly stated that *Paddock did not involve exclusive dealing arrangements.*

> [T]his case involves exclusive *distributorships*. Despite the similarity in nomenclature [to the term "exclusive dealing"], there is a difference . . . An exclusive dealing contract obliges a firm to obtain its inputs from a single source . . . . This was the genesis of the concern about foreclosure. A new [distributor of the product]

> could not find outlets. An exclusive distributorship, by contrast, does not restrict entry at either level. None of the newspapers in Chicago (or anywhere else) has promised by contract to obtain all of its news from a single source–and the sources have not locked all of their output together .... A new entrant to the supplemental news service business could sell to every newspaper in the United States, if it chose to do so.

Paddock, 103 F.3d at 46.

The majority cites to a sentence of dicta in *Paddock* which states that "the FTC and the Supreme Court concluded that even exclusive dealing contracts are lawful if limited to a year's duration." *Id.* at 47 (citing to *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395-96, 73 S.Ct. 361, 363-64, 97 L.Ed. 426 (1953)). The authority cited by the court in *Paddock* does not stand for this general proposition, however. In *Motion Pictures*, the exclusive dealing arrangements in question were the agreements between distributors of films that advertised products for sales and theatre owners. Under the agreement, the theatre owner was to show only advertising films from a single distributor. In this case, four distributors had exclusive dealing contracts with seventy-five percent of the theatres in the United States. The exclusive dealing arrangements lasted up to five years. *See Motion Picture*, 344 U.S. at 393-94, 73 S.Ct. at 362-63.

The Supreme Court upheld a Federal Trade Commission decision to outlaw any exclusive dealing

arrangements between distributors and theatre owners that lasted longer than one year. *See Motion Picture*, 344 U.S. at 393-96, 73 S.Ct. at 362-64. The Supreme Court upheld the Federal Trade Commission decision because the Federal Trade Commission came to this conclusion only after considering the *totality* of the circumstances in that case. *See Id.*

The Supreme Court also upheld the Federal Trade Commission's decision in *Motion Picture* to allow exclusive dealing arrangements that lasted only one year. The Supreme Court concluded that the Federal Trade Commission's findings for that particular case supported the determination that one-year exclusive dealing arrangements did not have unacceptable anticompetitive effects:

> The Commission found that the term of one year had become a standard practice and that the continuance of exclusive contracts so limited would not be an undue restraint upon competition, in view of the compelling business reasons for some exclusive arrangement. . . . The point where a method of competition becomes "unfair" . . . will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

Id. at 396, 73 S.Ct. at 364.

Thus, the Supreme Court in *Motion Picture* agreed with the Federal Trade Commission's determination that exclusive dealing arrangements lasting one year or less between distributors and theatre owners were

legal where substantial evidence showed that the exclusive dealing arrangements were not an undue restraint and there were compelling business reasons to allow the exclusive dealing arrangements. *See Id.* In the present case, the jury found just the opposite.

The majority's citation to *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir.1983) is also inapposite. In *Barry Wright*, the court examined the legality of a buyer's agreement with a manufacturer to purchase a set amount of "mechanical snubbers." The First Circuit first noted that such a contract was not necessarily a contract that involved exclusive dealing:

> [The buyer] did not actually promise to buy all its requirements from [the manufacturer]; it entered into a contract for a fixed dollar amount. There is an important difference between a "requirements" contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. A true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others any excess amount that he may want.

Barry Wright, 724 F.2d at 237 (internal quotation marks and citation omitted).

Furthermore, the court rejected the argument that the snubber contract length of two years had anticompetitive effects. *See Id.* In the snubber marketplace, buyers had to place orders at least six months in advance of delivery. *See Id.* Thus, given the nature of the snubber market, a contract term of two years was not unreasonable. The court also noted that the manufacturer of the snubbers was in no position to foreclose new competition. *See Id.* The court considered many factors before finally concluding that the district court "could reasonably have concluded that the [contracts for mechanical snubbers] were not 'exclusionary.'" *Id.* at 238.

The facts of the present case are completely different from the situation presented in *Barry Wright.* First, there is no dispute that Gilbarco enforces *exclusive dealing* arrangements with its distributorships. Second, there is no suggestion that the petroleum dispenser market requires buyers to purchase retail petroleum dispensers well in advance of delivery. Third, Gilbarco has the greatest percentage of the market for retail petroleum dispensers and is in a position to foreclose new competition. Thus, *Barry Wright* does not support the majority's conclusion that contract terms that provide for short length and terminability on short notice "negate substantially [the] potential [of Gilbarco's exclusive dealing arrangement] to foreclose competition."

The majority's reliance on *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir.1993), is also misplaced. In *U.S. Healthcare, Inc.*, the First Circuit addressed an exclusivity arrangement whereby doctors agreed to serve only one particular HMO in exchange for higher compensation. *See U.S. Health-*

care, 986 F.2d at 592. The First Circuit rejected the appeal, in part, because the appellant in that case failed to discuss factors listed by the Supreme Court in *Tampa*. *See Id.* at 595. The First Circuit noted that the following issues were simply not addressed:

> First, the extent to which the clause operated economically to restrict doctors is a serious question. True, most doctors signed up for it; but who would not take the extra compensation when no competing non-staff HMO was yet operating? The extent of the financial incentive to remain in an exclusive status is unclear, since it varies with patient load, and the least loaded (and thus least constrained by the clause) doctors would normally be the best candidates for a competing HMO. Healthsource suggests that by relatively modest amounts, U.S. Healthcare could offset the exclusivity bonus for a substantial number of Healthsource doctors. U.S. Healthcare's reply brief offers no response.

Id. at 595-96.

The First Circuit also addressed the fact that the exclusivity clause for the contracts between HMO and doctor was of short duration. Although noting that such short term contracts would not usually violate § 3 of the Clayton Act, the *U.S. Healthcare* court ultimately recognized that determining if a violation occurred requires the consideration of many factors. *See Id.*

The majority's failure to adequately consider the totality of the circumstances *in addition to* the literal terms of the Gilbarco distributorship agreements is contrary to controlling Supreme Court and Ninth Circuit precedent. The better approach is to consider the overall reality of the marketplace according to the Rule of Reason. Although short length of contract and terminability on short notice are factors to weigh under the Rule of Reason, consideration of these two factors alone does not end the analysis required under *Tampa*, *Jefferson Parish*, and *Twin City*.

III. SUBSTANTIAL EVIDENCE OF CLAYTON ACT § 3 VIOLATION

A. First Two Tampa Factors: Defining the Line of Commerce and Area of Competition

In this case, the first two *Tampa* factors–the line of commerce and area of competition–consist of the sale of retail gasoline dispensers in the United States *to small independent buyers who purchase retail petroleum dispensers from distributors*. The majority incorrectly defines the line of commerce and area of competition as the sale of *all* retail petroleum dispensers from manufacturers. To understand why the relevant market does not include *all* sales of retail petroleum dispensers, it is important to understand the retail petroleum dispenser market.

The sale of retail petroleum dispensers to end-users occurs in two ways: (1) direct sales from manufacturers of petroleum dispensers to major oil companies and large convenience store chains; and (2) sales

from distributors of petroleum dispensers to independent gasoline station owners, regional petroleum marketers, and small oil companies ("small independent buyers").

Major oil companies purchase retail petroleum dispensers from more than one manufacturer.[7] The major oil companies want to have more than one supplier to ensure an alternate source of petroleum dispensing products. Gilbarco gives some major oil companies discounts on retail petroleum dispensers.

Small independent buyers, in contrast, purchase retail petroleum dispensers from a single distributor and develop long-term relationships with that distributor. The key reason for the small independent buyers to stay with a particular distributor is that they want a single reliable source of service and products. One former distributor of Gilbarco retail petroleum dispensers explained:

> Well, major oil companies have engineers and consultants and experts that go out and inspect the stuff and lay it all out for them. These [buyers from distributors] were small business [people] who depended on me and my company to spec them the correct equipment that could be serviced and taken care of and not have to be worried about.

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[7] Omega's witnesses testified about Gilbarco's relationship to the major oil companies. It is not clear from the record whether the term "major oil companies" is meant to include large convenience store chains or refers only to major oil companies.

As a result of the small independent buyers' reliance on particular distributors, small independent buyers normally do not change distributors. For example, the customer base of one Gilbarco distributor has not changed significantly in the last forty years.

This evidence shows that the sale of retail petroleum dispensers to small independent buyers is an entirely different market from the sale of retail petroleum dispensers to major oil companies. Unlike major oil companies, small independent buyers have strong reasons to buy from a single distributor. Nor is there any evidence in the record to suggest that small independent buyers have the option of purchasing retail petroleum dispensers directly from manufacturers such as Gilbarco. Gilbarco's own reluctance to allow discounts and dissemination of price information to small independent buyers–though discounts and price dissemination were common for major oil companies–shows that Gilbarco itself sought to maintain two distinct markets. By failing to recognize the substantial evidence in the record showing this bifurcation in the retail petroleum dispenser market, the majority incorrectly defines the line of commerce and area of competition.

B. Third Tampa Factor: Substantial Foreclosure

1. Dominance of Gilbarco

In the present case, the parties do not dispute that Gilbarco dominates the retail petroleum industry with a fifty-five percent market share. The three major manufacturers of retail petroleum dispensers in the United States–Gilbarco, Dresser-Wayne, and Tokheim–have

almost ninety percent of the market. Omega presented expert testimony at trial to establish that these three manufacturers constitute an oligopoly.

2. Industry-Wide Practice of Exclusive Dealing

The parties do not dispute that Gilbarco, Dresser-Wayne, and Tokheim use exclusive dealing arrangements in the retail petroleum dispenser market by prohibiting their distributors from selling competing brands of retail petroleum dispensers. Because Gilbarco, Dresser-Wayne, and Tokheim control almost ninety percent of the United States market, their common use of exclusive dealing arrangements constitutes an industry-wide practice.

3. Proportion of Affected Commerce in Comparison to Entire Market

The proportion of the market for retail petroleum dispensers affected by Gilbarco's exclusive dealing policies is significant. The majority recognizes that Gilbarco's exclusive dealing to distributors affected thirty-eight percent of all retail petroleum dispensers sold in the United States. If we look to the relevant market–the sale of retail petroleum dispensers to small independent buyers–the percentage is even higher. A market foreclosure of thirty-eight percent or more is enough to make a § 3 Clayton Act violation a possibility. *See Twin City*, 676 F.2d at 1304 (holding that 24% foreclosure was substantial under the facts of that case).

4. Probable Effect of the Exclusive Dealing

The majority accords considerable weight to its determination that Omega failed to prove that Gilbarco's exclusive dealing arrangements *actually* deterred entry into the market for retail petroleum dispensers. *See Jefferson Parish*, 466 U.S. at 29, 104 S.Ct. at 1567 (stating that to prove an unreasonable restraint of competition under the Sherman Act "necessarily involves an inquiry into the actual effect of the exclusive contract on competition"). Although an inquiry into actual effect is necessary, *Tampa* makes clear that a Clayton Act § 3 claim only requires proof of the "*probable* effect of the contract on the relevant area of effective competition." *Tampa*, 365 U.S. at 329, 81 S.Ct. at 629 (emphasis added). There is no requirement that *actual* deterrence be proved.

The majority states that the jury could not reasonably infer probable injury to competition "where the undisputed evidence shows increasing output, decreasing prices, and significantly fluctuating market shares among the major manufacturers." Majority Opinion at 1164-65. The majority's reasoning is not persuasive. Even assuming that the evidence at trial showed increasing output, the jury reasonably could have inferred probable injury to competition due to the substantial evidence of price distortion and entry barriers created by Gilbarco's exclusive dealing arrangements.

a. Price Distortion

Omega presented evidence to show that Gilbarco's exclusive dealing arrangements prevented the

prices of retail petroleum dispensers from falling as much as they would have without the exclusive dealing arrangements. The exclusive dealing arrangements for retail petroleum dispensers allowed manufacturers of retail petroleum dispensers to avoid intense price competition among themselves. Moreover, despite some decrease in prices, the prices of retail petroleum dispensers did not change much over time suggesting price stagnation.

Professor Leffler testified that under certain circumstances, exclusive dealing may have pro-competitive effects, e.g., preventing free-riding and focusing a distributor's attention on a particular product. Professor Leffler concluded, however, that the exclusive dealing arrangements in the retail petroleum dispenser industry have no such pro-competitive effects.

b. Entry Barriers

Omega also presented substantial evidence that Gilbarco's exclusive dealing arrangements caused actual as well as probable injury by shutting out potential competitors. To understand how this antitrust injury occurs, one must understand the retail petroleum dispenser market.

Small independent buyers purchase retail petroleum dispensers from a single distributor and develop long-term relationships with that distributor. Small independent buyers stay with a particular distributor in part because they need a single reliable source of products and services.

The majority contends that manufacturers may sell retail petroleum dispensers in two ways *in addition* to using distributors: (1) direct sales, and (2) creating new distributors from the group of six hundred contracting and service companies in the United States that work to build, install, and service equipment related to gas stations and fleet fueling or airport fueling systems.

For reasons already stated, direct sales of retail petroleum dispensers to small independent buyers is not a realistic possibility. Unlike major oil companies or large convenience store chains, the small independent buyer needs to buy retail petroleum dispensers from distributors in order to have a reliable source of products and services.

With regard to the majority's speculation that a manufacturer could enter the retail petroleum dispenser market by converting members of the group of six hundred contracting and servicing companies into distributors, the majority fails to consider Professor Leffler's testimony that the six hundred contracting and servicing companies were *not* a "serious" alternative to the existing group of five hundred distributors. Professor Leffler explained that this was so because the six hundred contracting and servicing companies were smaller firms that did not carry a full line of products and did not have established relationships with small independent buyers. Although the majority might prefer to believe the evidence to the contrary, this court is not free to revisit the conclusions reached by the jury where substantial evidence exists to support the jury's verdict.

Therefore, the only effective means of selling retail petroleum dispensers to small independent buyers

is through an existing distributor. There are only five hundred established distributors of retail petroleum dispensers in the United States. New entrants into the retail petroleum dispenser market need to gain access to this closed group of five hundred established distributors in order to sell to small independent buyers.

In order to gain access to this group of five hundred distributors, a new entrant theoretically has two options: (1) have existing distributors carry the new entrant's brand in addition to the brand of retail petroleum dispenser they already carry or (2) have distributors switch from their old brand of retail petroleum dispenser to the new entrant's brand. For the reasons stated below, neither of these options is a practical possibility.

i) Carrying More Than One Brand

Exclusive dealing eliminates the possibility of distributors carrying more than a single brand of retail petroleum dispenser. Gilbarco effectively enforced exclusive dealing. If a Gilbarco distributor violated its exclusive dealing arrangement with Gilbarco, Gilbarco would then terminate its distributorship leaving the former distributor at least temporarily without any retail petroleum dispensers to sell to its small independent buyers. For example, after Kelley-Omega and ATS joined Omega, Gilbarco terminated its relationship with them.

ii) Switching Brands

It is also difficult for existing distributors to switch brands. Although a Gilbarco distributor has the

contractual right to terminate his exclusive dealing arrangement with Gilbarco on sixty days notice and switch to a new manufacturer, this contractual right means little. Professor Leffler explained:

> [A distributor's] business value, because of the absence of [its] ability to build up a relationship with any other supplier in this particular instance, is dependent on continuing a relationship with Gilbarco. That is something that is very unlike [other] distributors except in the situation of manufacture[r]-owned distribution in other industries . . . .
>
> [T]he distributor because of the exclusive dealing has, in effect, been locked into a particular brand . . . the value of his business is closely tied [to] a continuing relationship with that single supplier.

One Gilbarco official acknowledged that it was "very difficult for the distributor to switch from one line of pumps to another line of pumps and convince its customers that it knows what it's doing." Under these circumstances, the short term and easy terminability provisions of the exclusive dealing arrangements are irrelevant. No distributor would ever terminate voluntarily for fear of losing its customers and ultimately its business.

The fates of Kelley-Omega and ATS illustrate the dangers that distributors face when they switch manufacturers. After Kelley-Omega and ATS joined Omega, and Gilbarco terminated their distributorships, Kelley-

Omega and ATS lost customers. As Professor Leffler explained, exclusive dealing in the retail petroleum dispenser industry caused distributorships to be closely tied to a particular brand. When a small independent buyer sees that its distributor no longer has a relationship with that particular brand, the small independent buyer loses confidence and takes its business elsewhere. ATS saw its earnings drop from two million dollars a month to only fifty thousand dollars a month. Gilbarco's termination of ATS and Kelley-Omega caused other Gilbarco distributors to refuse to be acquired by Omega.

As the above discussion demonstrates, Omega presented substantial evidence at trial that Gilbarco's exclusive dealing arrangements prevented distributors from carrying more than one brand of retail petroleum dispenser or from switching brands. Thus, Gilbarco's exclusive dealing arrangements had the anticompetitive effect of preventing movement of distributors between manufacturers.

In summary, Omega presented substantial evidence showing that (1) the line of commerce is retail petroleum dispensers; (2) the relevant market is the sale of retail petroleum dispensers to small independent buyers; (3) Gilbarco dominated the relevant market; (4) exclusive dealing is widely practiced in the relevant market; (5) the proportion of the relevant market affected by Gilbarco's exclusive dealing arrangements is very significant; and (6) Gilbarco's use of exclusive dealing arrangements in the relevant market causes serious anticompetitive effects by keeping the price of retail petroleum dispensers artificially high and creating entry barriers to the relevant market for new entrants.

Looking at the totality of the circumstances as we are required to do under *Tampa, Jefferson Parish,* and *Twin City,* I believe that the record contains substantial evidence to support the jury's conclusion that Gilbarco's use of exclusive dealing arrangements tends to suppress competition in the relevant market and therefore violates the Rule of Reason.

IV. JURY INSTRUCTIONS

On appeal, Gilbarco argues that the district court's Instruction 15-D incorrectly instructed the jury on antitrust injury. Before the district court, Gilbarco objected to instruction 15-D because the instruction did not include the following language concerning causation:

> Even if you find that plaintiffs have established all of the other elements of their exclusive dealing claim, *plaintiffs have not proven antitrust injury unless they can show that Gilbarco's exclusive dealing policy was the cause of their injury*, if any, rather than . . . their own lack of business acumen, efforts, organization, experience, or good fortune.

Gilbarco's objection to this instruction lacks merit. Instruction 15-D, as given by the district court, already had the following similar language concerning causation:

> In order for a plaintiff to recover on its first claim, plaintiff must prove an "antitrust" injury. *This means that a plaintiff must prove that it was injured as a result*

> *of the defendant's alleged exclusive dealing arrangement.* In order to prove that defendant caused antitrust injury, the plaintiff does not have to prove the dollar value of the injury. It requires only that plaintiff prove that it was in fact injured by defendant's alleged antitrust violation.

Both Gilbarco's proposed language and the language in Instruction 15-D make clear that the antitrust injury must have resulted from Gilbarco's alleged exclusive dealing arrangement. Although Instruction 15-D may not have been worded the way that Gilbarco wanted, "[a] party is not entitled to have the jury instructed in the particular language of his choice." *Brooks v. Cook*, 938 F.2d 1048, 1053 (9th Cir.1991).

No other specific objection to the jury instructions were raised in the opening briefs. Thus, one must conclude that the district court correctly instructed the jury on the § 3 Clayton Act claim.

CONCLUSION

Omega presented substantial evidence that Gilbarco suppressed competition in the marketplace through its use of dealing arrangements that require its distributors to sell only Gilbarco retail petroleum dispensers to small independent buyers. Moreover, the district court correctly instructed the jury on the § 3 Clayton Act claim. Therefore, I would affirm the jury's verdict holding Gilbarco liable for violating § 3 of the Clayton Act and awarding damages.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMEGA ENVIRONMENTAL, INC., et al., Plaintiffs, v. GILBARCO, INC., et al., Defendants.	No. C94-887Z MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U. S. District Judge:

(1) Defendant Gilbarco, Inc.'s motion to set aside the verdict and judgment or for a new trial, docket no. 404, is DENIED. The Court concludes that there is sufficient evidence in the record to support the jury verdict.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 1st day of April, 1996.

BRUCE RIFKIN, Clerk

By /s/ Casey Condon
Casey Condon
Deputy Clerk

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OMEGA ENVIRONMENTAL, INC., a Delaware corporation; ATS OMEGA, a Texas corporation; KELLEY OMEGA, a Washington corporation; JOHN J. REYNOLDS, individually; PATRICK J. REYNOLDS, individually; FEDORICO HALLER, individually; FRANCISCO CALLEJA, individually; FERNANDO CALLEJA, individually; WILLIAM H. KELLEY, individually; MICHAEL J. REYNOLDS, individually, Plaintiffs-Appellees, v. GILBARCO, INC., a Delaware corporation, Defendant-Appellant.	No. 96-35153 D.C. No. CV-94-00887-TSZ
OMEGA ENVIRONMENTAL, INC., a Delaware corporation; ATS OMEGA, a Texas corporation; KELLEY OMEGA, a Washington corporation; Plaintiffs-Appellants,	No. 96-35172 D.C. No. CV-[94]-00887-TSZ

and

JOHN J. REYNOLDS, individually; PATRICK J. REYNOLDS, individually; FEDORICO HALLER, individually; FRANCISCO CALLEJA, individually; FERNANDO CALLEJA, individually; WILLIAM H. KELLEY, individually; MICHAEL J. REYNOLDS, individually;

Plaintiffs,

v.

GILBARCO, INC., a Delaware corporation; ROCHESTER PETROLEUM EQUIPMENT COMPANY, a Minnesota corporation,

Defendants-Appellees.

OMEGA ENVIRONMENTAL, INC., a Delaware corporation; ATS OMEGA, a Texas corporation; KELLEY OMEGA, a Washington corporation; JOHN J. REYNOLDS, individually; PATRICK J. REYNOLDS, individually; FEDORICO HALLER, individually; FRANCISCO CALLEJA, individually; FERNANDO CALLEJA, individually; WILLIAM H. KELLEY, individually; MICHAEL J. REYNOLDS, individually,

Plaintiffs-Appellees,

No. 96-35594

D.C. No. CV-94-00887-TSZ

ORDER

v.

GILBARCO, INC., a Delaware corporation,

Defendant-Appellant.

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges

A majority of the panel has voted to deny appellees' petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Pregerson has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, § 1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, P.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, P.L. 101-588, § 4(a), 104 Stat. 2880.)

15 U.S.C. § 14

It shall be unlawful for any person engaged in commerce, in the course of commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented for use, consumption, or resale with the United States or any Territory thereof or the District of Columbia or any insular possession or the place under the jurisdiction of the United States, or fix a

price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 15, 1914, ch 323, § 3, 38 Stat. 731.)

UNITED STATES CONSTITUTION, AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of common law.